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In The

Supreme Court of the United States

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October Term, 1994

KEYSTONE CHAPTER, ASSOCIATED BUILDERS AND CONTRACTORS, INC., IN REPRESENTATION OF ITS MEMBERS,

Petitioner,

vs.

SECRETARY OF LABOR & INDUSTRY FOR THE COMMONWEALTH OF PENNSYLVANIA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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114 pp

QUESTION PRESENTED

Does the Pennsylvania Prevailing Wage Act, 43 P.S. § 165, *et seq.*, relate to employee benefit plans in more than "tenuous, remote, and peripheral manner" and is it, therefore, preempted by Section 514(a) of ERISA, 29 U.S.C. § 1144(a)?

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

Keystone Chapter, Associated Builders and Contractors, Inc. respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. *infra,* 4a-45a) is reported at 37 F.3d 945. The opinion of the District Court (App. *infra,* 46a-58a) is reported at 837 F. Supp. 654.

STATEMENT OF JURISDICTION

The Court of Appeals entered its original judgment on September 22, 1994. On October 19, 1994, the Court of Appeals denied a timely Petition For Rehearing (App. *infra* at 1a-2a) and amended its opinion. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 514(a) of ERISA, 29 U.S.C. § 1144(a) provides:

> Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)] and not exempt under section 4(b) [29 USCS § 1003(b)].

Relevant sections of the Pennsylvania Prevailing Wage Act, 43 P.S. § 165-1, *et seq.*, and the accompanying regulations, Pennsylvania Code, Title 34 § 9.101, *et seq.*, are discussed below.

STATEMENT OF THE CASE

Petitioner, Keystone Chapter, Associated Builders and Contractors, Inc. ("Keystone, ABC"), filed a Complaint in the United States District Court for the Middle District of

Pennsylvania seeking injunctive relief against the Secretary of Labor and Industry for the Commonwealth of Pennsylvania on the basis that the Pennsylvania Prevailing Wage Act, 43 P.S. § 165-1, *et seq.*, was preempted by ERISA, 29 U.S.C. § 1144(a). The District Court had jurisdiction of this ERISA preemption claim under 28 U.S.C. § 1331.

A complaint filed by Bell Telephone Company of Pennsylvania and Communications Workers of America, AFL-CIO, District 13, raised similar issues and was considered together with the Keystone case by both the District Court and the Court of Appeals.[1]

A. The Prevailing Wage Act, the Regulations, and the Declaratory Order

The Pennsylvania Prevailing Wage Act, like similar statutes of many other states, provides that "Not less than the prevailing minimum wages as determined hereunder shall be paid to all

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1. The other parties in the action before the District Court were the members of the Prevailing Wage Appeals Board and the Pennsylvania State Building and Construction Trades Council, AFL-CIO participated as an amicus in support of the Secretary's position. The amici, in support of Keystone ABC's position at the Circuit Court, were the United States Chamber of Commerce, ABC (National) and its Lehigh Valley (Pa.), Southeast Pennsylvania, and Western Pennsylvania Chapters, the Pennsylvania Builders Association, the Pennsylvania School Boards Association, and the Pennsylvania Utility Contractors Association. Amici in support of the Secretary's position were the Roofing Contractors Association, the Mechanical Contractors Association of Eastern Pennsylvania, Western Pennsylvania, and Laurel, the Plumbing & Heating Contractors Association of Philadelphia, the Penn-Jer-Del Chapter of National Electrical Contractors Association, the Sheetmetal Contractors Association of Pennsylvania, Central Pennsylvania, Philadelphia, Western Pennsylvania, the National Electrical Contractors Association of Western Pennsylvania, the Painting and Decorating Contractors Harrisburg Chapter, and the Masonry Contractors Association of Central Pennsylvania.

workmen on public work." 43 P.S. § 165-5, and sets forth general rules for determining prevailing minimum wages. Before public contracts are put out to bid, the Secretary of Labor and Industry, in consultation with an Advisory Board, determines the prevailing minimum wage for each locality and for each "craft or classification" of worker to be employed. 43 P.S. § 165-7. The statute further provides that in making this determination, "employer and employee contributions for employee benefits pursuant to a bona fide collective bargaining agreement shall be considered an integral part of the wage rate." *Id.*

The Pennsylvania Code, Title 34, §§ 9.101-9.113, provides additional rules for calculating and enforcing the prevailing minimum wage in public works contracts. These regulations define "contributions for employee benefits" to mean "all 'fringe benefits' paid of to be paid, including but not limited to, payment made whether directly or indirectly, to the workman for sick, disability, death, (other than workmen's compensation), medical, surgical, hospital, vacation, travel expense, retirement, and pension benefits." *Id.* § 9.102(1). The regulations further provide that, "Employers not parties to a contract requiring contributions for employee benefits which the Secretary his determined to be included in the general prevailing minimum wage rate shall pay the monetary equivalent thereof directly to the workmen." *Id.* § 9.106(b).

From at least 1988 until April 13, 1992, the Secretary used a strict line-item approach in determining compliance with a prevailing wage's benefits component. The Secretary made a predetermination of the prevailing wage for each category of worker in a given locality, specifying the "prevailing" levels of benefits in a number of categories, such as "health and welfare," "pension," and "apprenticeship and training." If an employer did not meet the prevailing level of benefit in each category, it was required to pay the difference in cash to the employee. To the extent that an employer contributed more to a fringe benefit than the amount set forth in a particular category, it could not use such excess contribution to offset any shortfall in any other category.

On April 13, 1992, in response to a complaint from Keystone, ABC and others that the Secretary's treatment of fringe benefits under the Prevailing Wage Act was preempted by ERISA, the Prevailing Wage Appeals Board issued a Declaratory Order which provided that a contribution for fringe benefits would be considered bona fide if that contribution, "(a) is made to an 'employee benefit plan' or fund or program subject to the Employee Retirement Income Security Act of 1974; (b) has been determined to be bona fide by the [Prevailing Wage] Division; and (c) is not required by federal, state, or local law; . . . " (This section of the Declaratory Order is found in the record before the Circuit Court at App. 73-74.)

B. Proceedings Below

On July 30, 1993, the District Court declared that the Prevailing Wage Act, its accompanying Regulations, and the Declaratory Order were preempted by Section 514(a) of ERISA, 29 U.S.C. § 1144(a). The court found that the Declaratory Order specifically referred to ERISA plans, that the Prevailing Wage Act could affect the level of benefits paid to employees by discouraging benefits in excess of the prevailing rate, and that the Act imposed administrative burdens on ERISA plans by requiring employers to keep records of wages and benefits. In reaching this conclusion, the District Court noted that, "We are in accordance with other Courts who have examined ERISA preemption with respect to similar prevailing wage laws. See, e.g., *General Electric Co. v. New York State Department of Labor*, 891 F.2d 25 (2nd Cir. 1989); *Associated Builders & Contractors v. BACA*, 769 F. Supp. 1537 (N.D. Cal. 1991)." (App. at 53a). The District Court declined the Secretary's request to sever the portion of the Act covering fringe benefits and leave standing a requirement that government contractors simply meet the prevailing cash wage because it believed such a system would be contrary to legislative intent.

The Secretary filed an appeal from the District Court's decision and argued that the Prevailing Wage Act, the Regulations, and the Declaratory Order were not preempted. Alternatively, the Secretary urged that the portion of the Prevailing Wage Act relating to fringe benefits be severed and that the Act be allowed to stand to the extent it regulates cash wages.

The Court of Appeals agreed with the District Court that the Declaratory Order was preempted by ERISA, but found that the Prevailing Wage Act and the Regulations do not relate to employee benefit plans in more than a "tenuous, remote, and peripheral manner" and reversed the District Court's judgment to the extent it held that they were preempted. In the initial part of its opinion, the Court of Appeals stated, "we find the Act and its Regulations are not preempted because they confer broad authority that may be implemented in a manner consistent with ERISA." (App. at 12a). In Part II, Section C, the court stated:

> Although the Declaratory Order implemented the Prevailing Wage Act in a manner preempted by ERISA, we hold that neither the Prevailing Wage Act nor its accompanying Regulations are preempted. Under at least one reasonable interpretation of the Act and Regulations, an interpretation the agency is free to adopt, the Act and Regulations merely require that the Secretary set a prevailing wage that consists of a cash component and may include a benefits component.

(App. at 27a).

The Court of Appeals utilized the same analytical framework which they set forth in *United Wire v. Moorestown Memorial Hospital*, 995 F.2d 1179 (3rd Cir. 1993), *cert. denied,* __ U.S. __, 114 S. Ct. 382, 383, 126 L. Ed. 2d 332 (1993).

REASONS FOR GRANTING THE WRIT

SUMMARY

Pennsylvania is one of approximately 35 states that have a Prevailing Wage Act that provides a wage rate applicable to employees who work on public works projects within the state. Many of these laws, like Pennsylvania's, provide that fringe benefits are an important element of the total wage package. The tension between these state prevailing wage laws and ERISA have resulted in an explosion of litigation across the country. The decision of the Third Circuit conflicts with that of the Second Circuit in *General Electric Co. v. New York State Department of Labor,* 891 F.2d 25 (2nd Cir. 1989), *cert. denied,* 496 U.S. 912, and utilizes an analysis that has been specifically prohibited by this Court's decision in the *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. __, 121 L. Ed. 2d 513, 113 S. Ct. 580 (1992). Several District Courts in other Circuits have agreed with the Second Circuit's approach in *G.E.*, while others have aligned themselves with the dissent in *G.E.* and analyzed the issue in a manner similar to that of the Third Circuit herein.

As noted above, the Third Circuit's decision is based upon its previous analysis of ERISA preemption issues in *United Wire v. Moorestown Memorial Hospital, supra.* On October 7, 1994, this Court granted a Petition for Certiorari in *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Insurance Co.,* 14 F.3d 708 (2nd Cir. 1994), *cert. granted,* 63 L.W. 3291, in which one of the questions presented dealt with the conflict between the Second Circuit and the Third Circuit's decision in *United Wire.*

I.

THE COURT OF APPEALS' INTERPRETATION OF SECTION 514(a) OF ERISA IS CONTRARY TO THE DECISIONS OF THIS COURT.

ERISA contains one of the broadest preemption clauses ever enacted by Congress. *See Franchise Tax Bd. v. Construction Laborers Trust,* 463 U.S. 1, 24 n. 26 (1983). ERISA's preemption provision expressly preempts "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). This Court has determined that a law "relates to" an employee benefit plan within the meaning of the statute "in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Airline, Inc.,* 463 U.S. 85, 97 (1983). "Any connection may trigger preemption, and preemption is not limited to laws relating to the specific subjects covered by ERISA." *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 47-48 (1987). ERISA preemption provides a mechanism to insure that variances in the regulation of these benefits do not arise and employers are not discouraged from adopting benefits not already in existence, or, on the other hand, they will refrain from reducing benefits already in place. *See Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1 (1987).

In *District of Columbia v. Greater Washington Board of Trade, supra,* this Court analyzed the issue of ERISA preemption in the context of a provision of the District's worker's compensation law that required an employer to continue to provide health insurance coverage equivalent to the existing health insurance coverage of the employee while the employee receives, or is eligible to receive, worker's compensation benefits. The Court found that the worker's compensation law "related to" a covered employee benefit plan because the employer's requirement was "measured by reference to" a covered employee benefit plan which is not exempt under Section 514(b) of ERISA.

It is respectfully suggested that the Third Circuit failed to understand the important distinctions between this Court's holding in *Greater Washington Board of Trade* and its earlier decision in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 103 S. Ct. 2890 (1983). The Court in *Shaw* had before it, in pertinent part, a disability law which mandated a certain number of weeks of benefits. Under Section 4(b) of ERISA, disability benefit plans are exempted from ERISA. Therefore, the plan the law created was also an exempt plan. *Shaw* at 106. Because the exempt plan's benefit levels were not measured by a covered ERISA plan, the disability law in *Shaw* did not relate to a covered ERISA plan. Thus, the holding in *Shaw* was straightforward; the disability law was not preempted because it did not relate to a covered ERISA plan. The Court further held that if the state law required that the exempt plan be a part of the covered ERISA plan, the required combination of the plans would "relate toll the covered plan, and thus resulting in ERISA preemption. However, if the state law merely gave the employer the option (but not the requirement) to combine the two plans, the law would not preempted. *Id.* at 108.

In *Greater Washington Board of Trade*, this court stated:

> Petitioners nevertheless point to *Metropolitan Life Insurance Co. v. Massachusetts,* 471 U.S. 724, 85 L.Ed.2d 728, 105 S. Ct. 2380 (1985), in which we described *Shaw* as holding that "the New York Human Rights Law and that state's disability benefits law "relate[d] to" welfare plans governed by ERISA.

Id. at 739, 85 L. Ed. 2d 728, 105 S. Ct. 2380.

> Relying on this dictum and their reading of *Shaw*, Petitioners argue that Section 514(a) should be construed to require a two-step analysis:
>
> If the state law "relate[s] to" an ERISA-covered plan, it may still survive pre-emption if employers could comply with the law through separately administered plans exempt under Section 4(b).... As we have explained, the disability benefits law uphold in *Shaw* — though mandating the creation of a "welfare plan" as defined in ERISA — did not relate to a welfare plan subject to ERISA regulation. Section 2(c)(2) does, and that is the end of the matter. We cannot engraft a two-step analysis onto a one-step statute.

Id. at 522.

It is respectfully suggested that the Third Circuit, contrary to the teachings of this Court, has engrafted a two-step analysis on a one-step statute. In *Associated Builders and Contractors, Saginaw Valley Area Chapter v. Perry*, No. 93-CV-10016-BC, 2 WH Cases 2d (BNA) 754 (E.D. Mich. 1994) (Cleland, J.), the court analyzed the Third Circuit's decision in the context of an ERISA challenge to the Michigan Prevailing Wage Act which is very similar to that of Pennsylvania's. The court found that the Third Circuit was guilty of engrafting a "two-step analysis onto a one-step statute, first finding that the benefits component of the Prevailing Wage Act had 'some connection' to (*i.e.*, was related to) employee benefit plans, then finding no preemption because employers could comply with the law by not paying any benefits if they paid a sufficiently high cash wage. This Court rejects the *Keystone* Court's two-step analysis." *Id.* at 758.

In its analysis of the Prevailing Wage Act and the Regulations, the Third Circuit quoted from Section 165-7 of the Act which states:

> The Secretary shall, after consultation with the Advisory Board, determine the general prevailing minimum wage rate in the locality in which the public work is to be performed for each craft or classification of workmen needed to perform public work contracts during the anticipated term thereof: Provided, however, that employer and employee contributions for employee benefits pursuant to a bond fide collective bargaining agreement shall be considered an integral part of the wage rate for the purpose of determining the minimum wage rate under this Act.

43 P.S. § 165-7. The Third Circuit's conclusion that this language does not "relate to any employee benefit plan" covered by ERISA is patently incorrect. The language quoted above is mandatory. It requires the Secretary to treat benefit contributions as an integral part of the wage rate. Such benefit contributions made pursuant to collective bargaining agreements are, by definition, employee benefit plans which are defined by the statute as follows:

> The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

29 U.S.C. § 1002(3).

The term "employee welfare benefit plan" is further defined as follows by the ERISA statute:

> The term "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employer organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death, or unemployment, or vacation benefits, apprenticeship or other training programs, or daycare centers, scholarship funds, or prepaid legal services, or (B) any benefit described in Section 302(c) of the Labor Management Relations Act, 1947 [29 U.S.C. § 186(c)] (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. § 1002(1).

In *Greater Washington Board of Trade, Id.* at 520, this Court stated, " 'Under Section 514(a), ERISA preempts any state law that refers to or has a connection with covered benefit plans (and it does not fall within a section 514(b) exception) even if the law is not specifically designed to effect such plans, or the effect is only indirect,' *Ingersoll-Rand, supra,* at 139, 112 L. Ed. 2d 474, 111 S. Ct. 478, and even if the law is 'consistent with ERISA'S substantive requirements,' *Metropolitan Life, supra,* at 739, 85 L. Ed. 2d 728, 105 S. Ct. 2380."

This Court then went on to state, "Section 2 (c) (2) of the District's Equity Amendment Act specifically refers to welfare benefit plans regulated by ERISA, and on that basis alone is preempted." Similarly, Section 165-7 of the Prevailing Wage Act quoted above specifically refers to welfare benefit plans and, therefore, should be preempted. The state law mandates that the Secretary shall consider certain collectively bargained employee benefit plans as an "integral part" of the wage rate to be determined, which, in turn, is used to impose state law obligations on all public works contractors. The law clearly, therefore, references employee benefit plans in fulfilling the purpose of the Act. This leads to the inescapable conclusion that the Pennsylvania Prevailing Wage Act "relates to" employee benefit plans within the meaning given that term by this Court.

The Petition should be granted to further clarify the proper scope of ERISA preemption, particularly in the context of a state prevailing wage law.

II.

THE COURT OF APPEALS' ANALYSIS OF ERISA PREEMPTION IN THE CONTEXT OF A STATE PREVAILING WAGE ACT CONFLICTS WITH THE SECOND CIRCUIT'S ANALYSIS AS WELL AS THAT OF VARIOUS DISTRICT COURTS.

As noted above, the District Court declared that its finding of preemption was in accord with other courts to examine similar issues. The District Court specifically stated:

> We believe that the Pennsylvania Prevailing Wage Act, its Regulations, and the Declaratory Order are clearly preempted by ERISA because this state law necessarily

> relates to ERISA plans. In so finding, we are in accordance with other courts who have examined ERISA preemption with respect to similar prevailing wage laws. See, e.g., *General Electric Co. v. New York State Department of Labor,* 891 F.2d 25 (2nd Cir. 1989); *Associated Builders and Contractors v. BACA,* 769 F. Supp. 1537 (N.D. Cal. 1991).

(App. at 53a). In *G.E.*, the contractor was signatory to a collective bargaining agreement with IBEW Local 3. This contract provided for a number of nationally-administered ERISA plans covering such things as pensions, disability, medical assistance, and job and income security, and the contract was designed to be applicable to G.E. employees regardless of the state or locality in which the employees might be working. The following language of the Second Circuit sets forth the dilemma which faced *G.E:*

> The District Court found that the supplements provided by G.E. were "different from and in some cases less than those which the State claims are due under Section 220." In each instance, where the cost of a supplement provided for in the G.E. — Local 3 contract did not correspond with the cost of a similar prevailing local benefit, Section 220 required G.E. either to bring the cost of its prescribed benefit into equivalence with the cost of the local prevailing one or to pay the additional cost directly to the employee-beneficiaries. G.E. was not permitted to substitute one form of supplement for another. In the words of the Appellate Division for the Department, "the statute indicates that the legislature intended that the Commissioner of Labor, not the

> contractor, determined the supplements to be provided and that the employee receive either the listed benefits or equivalent cash. (or a combination of both)." As the District Court found, "G.E. received no credits under the statute for its cost for providing benefits which were not deemed to be 'prevailing benefits by the Commissioner.' " [citations omitted]

891 F.2d at 27.

In reaching its conclusion that the relevant provisions of the New York law were preempted by ERISA, the Second Circuit stated:

> A state law "relates to" employee benefit plans when it has "connection with or reference to" such a plan, *Gilbert v. Burlington Industries, Inc.*, Supra, 765 F.2d at 327 (quoting *Shaw v. Delta Airlines,* Supra, 463 U.S. at 97), "whenever it 'purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans.' 29 U.S.C. § 1144(c)(2) (1976)." *Stone & Webster Engineering Corp. v. Ilsley,* 690 F.2d 323, 329 (2nd Cir. 1982), Aff'd sub. nom. *Arcudi v. Stone and Webster Engineering Corp.,* 463 U.S. 1220 (1983). Such connection exists where a state statute prescribes either the type and amount of an employer's contributions to a plan, *Local Union No. 598 v. J. A. Jones Constr. Co.*, supra, 846 F.2d at 1219; *Stone & Webster Engineering Corp.,* supra, 690 F.2d at 329,

the rules and regulations under which the plan operates, *Hewlett-Packard Co. v. Barnes,* 425 F.Supp. 1294, 1297-1300 (N.D. Cal. 1977), Aff'd, 571 F.2d 502 (9th Cir.) (per curiam), cert. denied, 439 U.S. 831 (1978); or the nature and amount of the benefits provided thereunder, *Standard Oil Co. v. Agsalud,* 442 F.Supp. 695, 706-07 (N.D. Cal. 1977) aff'd, 633 F.2d 760 (9th Cir. 1980), Aff'd, 454 U.S. 801 (1981). Section 220 intrudes into all three of these preempted areas. Ex-locality employers such as G.E. are required either to bring their pension and welfare plans into conformity with those prevailing in the locality (as the prevailing plans are determined to exist by a state fiscal officer on the basis of job classifications made by the Department of Labor) or to make up the difference through cash payments to their employees. The employer is required to keep, and on request to file with the state, sworn schedules of supplements in wages and to make its books and records pertaining to wages, supplements and hours of labor available for inspection by a state fiscal officer. In the event the employer fails to bring a plan into conformity with a similar plan prevailing in the locality, the employee may be required to accept cash payments based on what the employer's cost would have been to accomplish conformity, *Action Electrical Contractors Co. v. Goldin,* Supra, 64 N.Y.2d at 218, 222, payments that may be of lesser value to the employee than the unpaid benefits would have been. In sum, we

> conclude that the above-described provisions of Section 220 clearly relate to the ERISA plans of ex-locality employers and are preempted by the federal statute.

891 F.2d at 29-30.

The Second Circuit's decision makes it clear that it is both the obligation to bring their existing benefits into conformity with those prevailing in the locality (or to make up the difference through cash payments to their employees), as well as the record keeping requirements that results in the finding of preemption. The District Court below found that:

> Contractors are required, at a minimum, to determine the cash equivalent of the benefits provided to workers on public projects. The Act therefore imposes on-going administrative burdens that fall within the parameters of ERISA plans. See, *Fort Halifax*, 482 U.S. at 14, n.9, ("The ongoing, predictable nature of this obligation therefore creates the need for an administrative scheme to process claims and pay out benefits").

(App. at 54a). Such a scheme is preempted by ERISA. The Third Circuit's rejection of this finding of the District Court places it squarely in conflict with the Second Circuit.

The District Court further concluded that an even more important reason for finding preemption was the affect that the Prevailing Wage Act could have on the level of benefits paid to employees. The court stated:

> Because an employer gets no credit for the

> amount of hourly benefits paid in excess of the prevailing rate, employers are discouraged from paying benefits at higher than the prevailing rate on public works projects. The effect of the Act is to "dictate or restrict the choices of ERISA plans with regard to their benefits." *United Wire*, slip op. at 28. Employers who also work on non-public projects may be forced, to provide different levels of benefits, depending on the type of project to be completed. Such a "patchwork scheme of regulation would introduce considerable inefficiency in benefit program operation." *Fort Halifax*, 482 U.S. at 11, 107 S. Ct. at 2217.

(App. at 54a).

This aspect of the court's decision was in accord with the decision of the United States District Court for the Northern District of California in *ABC v. BACA, supra.* It must be noted that there is not even agreement on this point within the Northern District of California, however. In *WSB Electric, Inc. v. Curry*, No. 90-00771 CW, 1994 WL 446039, 18 EBC 2036 (N.D. Cal. 1994), the court rejected the argument that the California prevailing wage statute discriminates against ERISA plans which pay higher than prevailing benefit levels. The court further indicated that it found itself in agreement with the dissent in *G.E.* rather than the majority.

As previously mentioned, the United States District Court for the Eastern District of Michigan recently held that the Michigan Prevailing Wage Act was preempted by ERISA. The Michigan Court found itself squarely in agreement with the *G.E.* Court, the *BACA* court, and the District Court below in finding that the disincentive created by the Prevailing Wage Act from paying benefits at higher than the prevailing rate necessarily meant that the prevailing wage law related to and regulated ERISA plans. The Michigan court further concluded that, "Employers who fall within the Michigan Prevailing Wage Act are required to calculate the wages and benefits paid on another than hourly basis toward the prevailing fringe benefit obligation. The effect of this requirement is also to dictate the reporting and administration of ERISA plans. Such a requirement 'relates to' an ERISA plan and is therefore preempted by ERISA." *Saginaw ValleyABC, supra,* at 760.

The Third Circuit's decision is in conflict with a decision of the Tenth Circuit as to whether or not a prevailing wage law represented an example of the state's traditional exercise of its police powers. In *National Elevator Indust. Inc. v. Calhoon,* 957 F.2d 1555 (10th Cir. 1992), the court recognized and rejected the state's traditional police powers argument within the context of a prevailing wage act. In rejecting this argument, the court analyzed numerous federal decisions which have found preemption of similar state laws, despite any traditional "police powers" argument. The Court's attention is called to the Tenth Circuit's analysis of *Hydrostorage, Inc. v. Northern Cal. Boilermakers Local Joint Apprenticeship Committee,* 891 F.2d 719 (9th Cir. 1989), *cert. denied,* 111 S. Ct. 72, 112 L. Ed. 2d 46 (1990); *Electrical Joint Apprenticeship Committee v. MacDonald,* 949 F.2d 270 (9th Cir. 1991); *Boise Cascade Corp. v. Peterson,* 939 F.2d 632 (8th Cir. 1991); *G.E., supra;* and *BACA, supra.* The Third Circuit, however, characterized the Pennsylvania Prevailing Wage Act as a "wage law" and as such was among the "many forms of state regulation under the police power, which resulted in increases in the cost of doing business."

It is apparent that there exists a sharp division of opinion regarding the proper analysis of ERISA preemption principles in the context of a challenge to a state's prevailing wage law. This Court should grant this Petition to resolve this conflict among the lower federal courts.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED OCTOBER 19, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-7547 & 93-7573

KEYSTONE CHAPTER ASSOCIATED BUILDERS AND CONTRACTORS, INC., in representation of its members

v.

THOMAS P. FOLEY, in his official capacity as the Secretary of Labor and Industry for the Commonwealth of Pennsylvania

PENNSYLVANIA STATE BUILDING AND
CONSTRUCTION TRADES COUNCIL
(Amicus in District Court)

Thomas P. Foley,
Appellant in No. 93-7547

Keystone Chapter, Associated Builders
and Contractors, Inc., in representation
of its members,
Appellant in No. 93-7573

(D.C. Civ. No. 92-00459)

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge,*
BECKER, STAPLETON, MANSMANN, HUTCHINSON,

SCIRICA, COWEN, NYGAARD, ALITO, LEWIS
and McKEE, *Circuit Judges.*

The petition for rehearing filed by appellee/cross-appellant Keystone Chapter, Associated Builders and Contractors, Inc., in representation of its members, in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

s/ Scirica
Circuit Judge

Dated: OCT 19 1994

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED OCTOBER 19, 1994

[Same Caption]

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action Nos. 92-00459 & 92-01105)

Argued April 13, 1994

Before: BECKER, MANSMANN and SCIRICA, *Circuit Judges*

ORDER AMENDING SLIP OPINION

IT IS HEREBY ORDERED that the slip opinion in the above case, filed September 22, 1994, be amended as follows:

1. By signaling footnote 11 after the word "contributions." on page 15, line 8, and inserting the following footnote:

> 11. Keystone also cross-appealed to preserve Counts II, III and IV of its Complaint in 92-0459 which had been effectively dismissed by the district court in light of the nature of the relief it granted on Count I (ERISA preemption).

2. Renumber all subsequent footnotes.

BY THE COURT,

s/ Scirica
Circuit Judge

DATED: OCT 19 1994

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED SEPTEMBER 22, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 93-7547 & 93-7573

KEYSTONE CHAPTER, ASSOCIATED BUILDERS AND CONTRACTORS, INC., in representation of its members

v.

THOMAS P. FOLEY, in his official capacity as the Secretary of Labor and Industry for the Commonwealth of Pennsylvania

PENNSYLVANIA STATE BUILDING AND
CONSTRUCTION TRADES COUNCIL
(Amicus in District Court)

Thomas P. Foley,
Appellant in No. 93-7547

Keystone Chapter, Associated
Builders and Contractors,
Inc., in representation of its
members,
Appellant in No. 93-7573

No. 93-7548

BELL TELEPHONE COMPANY OF PENNSYLVANIA; COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, DISTRICT 13 v.

THOMAS P. FOLEY; in his official capacity as Secretary of Labor and Industry for the Commonwealth of Pennsylvania; JAMES R. DAVIS; FRAYDA KAMBER; RICHARD W. MARTZ; JOHN H. MICKENS

PENNSYLVANIA STATE BUILDING AND
CONSTRUCTION TRADES COUNCIL, AFL-CIO
(Amicus in District Court)

Thomas P. Foley;
James R. Davis;
Frayda Kamber;
Richard W. Martz;
John H. Mickens,
Appellants

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action Nos. 92-00459 & 92-01105)

Argued April 13, 1994

Before: BECKER, MANSMANN and SCIRICA,
Circuit Judges

(Filed September 22, 1994)

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OPINION OF THE COURT

SCIRICA, *Circuit Judge.*

In this appeal, we must decide whether the Employee Retirement Income Security Act of 1974 (ERISA)[1] preempts a Pennsylvania minimum wage law applying to public works projects. We hold that such a law may not refer to ERISA plans or accord them special treatment, but may set minimum wages and give employers the option of satisfying a portion of the wage through contributions for employee benefits.

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[1] Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 5, 18, 26, 29, 31, & 42 U.S.C.).

An employer, an employers' association, and a labor union[2] sued Pennsylvania's Secretary of Labor and Industry and the members of the state Prevailing Wage Appeals Board (collectively, the Secretary) in federal district court, claiming Pennsylvania's Prevailing Wage Act (the Act),[3] its accompanying regulations, and an administrative Declaratory Order interpreting the Act are preempted by ERISA. The district court agreed and overturned the Act, regulations, and order. The Secretary of Labor and Industry appeals, and the employers' association cross-appeals.

We agree the Declaratory Order implements the Act in a manner preempted by ERISA. But we find the Act and its regulations are not preempted because they confer broad authority that may be implemented in a manner consistent with ERISA. Therefore we will affirm the judgment of the district court striking the Declaratory Order, but reverse its judgment striking the Act and accompanying regulations.

I.

A. The Prevailing Wage Act

The purpose of the Prevailing Wage Act "is to protect workers employed on public projects from substandard wages by insuring that they receive the prevailing minimum wage." *Lycoming County Nursing Home v. Pennsylvania,* 627 A.2d 238,

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[2] These were, respectively, the Bell Telephone Company of Pennsylvania, Keystone Chapter, Associated Builders and Contractors, Inc., and the Communications Workers of America, AFL-CIO, District 13.

[3] P.L. 987 (1961) (codified at 43 P.S.A. § 165).

242 (Pa. Commw. Ct. 1993). The statute provides, "Not less than the prevailing minimum wages as determined hereunder shall be paid to all workmen on public work," 43 P.S.A. § 165-5, and sets forth general rules for determining prevailing minimum wages. Before public contracts are put out to bid, the Secretary of Labor and Industry, in consultation with an Advisory Board, determines the prevailing minimum wage for each locality and for each "craft or classification" of worker to be employed. 43 P.S.A. § 165-7. In making this determination, "employer and employe contributions for employe benefits pursuant to a bona fide collective bargaining agreement shall be considered an integral part of the wage rate." *Id.* The statute does not define "prevailing minimum wage rate," nor specify how contributions for benefits are to be integrated into the wage rate.[4]

The seven-member Prevailing Wage Appeals Board hears "any grievance or appeal arising out of the administration of this act" "[p]romulgate[s] rules and regulations necessary to carry out [its] duties." 43 P.S.A. § 165-2.2(e). Contractors and subcontractors must "keep an accurate record showing the name, craft and the actual hourly rate of wage paid to each workman employed by him in connection with public work" for two years following payment, subject to inspection by the Secretary and the public body awarding the contract. *Id.* § 165-6.

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[4] Pennsylvania's Commonwealth Court has held that despite the lack of definition the terms "prevailing minimum wage rate" and "craft or classification" are "adequate primary standards to guide the Secretary in the exercise of his duties under [§ 165-7]," so that the statute does not assign the Secretary "unacceptably excessive discretion." *Pennsylvania v. Alternose Construction Co.*, 368 A.2d 875, 881 (Commw. Ct. Pa. 1977).

B. The Accompanying Regulations

The Pennsylvania Code, Title 34 §§ 9.101-9.112, provides additional rules for calculating and enforcing the prevailing minimum wage in public works contracts. The regulations make clear that a prevailing minimum wage will state a cash wage and a level of benefits contributions as separate components. Contractors and subcontractors must pay "[n]ot less than the general prevailing minimum wage rates determined by the Secretary." If a contract does not provide for employee benefits contributions "which the Secretary has determined to be included in the general prevailing minimum wage rate," the employer may pay "the monetary equivalent thereof." *Id.* § 9.106.

Contributions for employee benefits are defined as " '[f]ringe benefits' paid or to be paid, including payment made whether directly or indirectly, to the workmen for sick, disability, death, other than Workmen's Compensation, medical, surgical, hospital, vacation, travel expense, retirement and pension benefits." *Id.* § 9.102. Contractors may pay their workers above the prevailing rate. *Id.*

To determine the prevailing minimum wages and benefits in a locality, the Secretary considers local collective bargaining agreements between established bargaining representatives and employers and other information. *Id.* § 9.105. The regulations specify additional records and reporting requirements for employers. *Id.* §§ 9.109, 9.110. The Secretary may investigate and hold hearings on allegations of underpayment, and may bar public contracts with a violating firm and request the Attorney General to recover penalties. *Id.* § 9.111.

C. The April 13, 1992 Declaratory Order

Although the Act and regulations specify the prevailing minimum wage will have separate cash and benefits components, they do not state whether the benefits component should merely state the total level of benefits contributions an employer must make (through benefits contributions or their cash equivalent), or whether it should specify which types and levels of benefits must be given. That issue has been resolved by the Secretary and Board in different ways at different times.

For several years prior to April 13, 1992, the Secretary used a "line-item" approach in determining compliance with a prevailing wage's benefits component.[5] The Secretary made a "predetermination" of the prevailing wage for each category of worker in a given locality, specifying the prevailing levels of benefits in a number of categories, such as "health-and-welfare," "pension," and "apprenticeship-and-training". An employer had to meet the prevailing level of each category of benefit, or pay the shortfall in cash to the worker. An employer was not given credit toward the benefits component for benefits provided in a given category in excess of that required in the predetermination, nor for any benefits paid in a category not included in the predetermination. Thus, in addition to paying the prevailing cash wage, an employer was required either to make benefits contributions in the specified categories and amounts or to pay cash to the extent its benefits contributions fell short in any specified category.[6]

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[5] The Department apparently officially adopted the line-item approach in 1988. In its brief to the Prevailing Wage Appeals Board, the Prevailing Wage Division of the Department of Labor and Industry cites as its earliest authority for the line-item approach a 1988 decision of the Secretary. *In re: Francesco Scrivofilo, t/d/b/a Franco Elec. Co.*, Determination of the Secretary (Dec. 1, 1988). Bell and the Communications Workers of America claim their wage and benefits packages were not reviewed for line-item compliance for a number of years, presumably prior to 1988.

On November 28, 1990, counsel for Keystone Chapter, Associated Builders and Contractors, Inc., a construction industry employers' association wrote to the Secretary, complaining about the line item approach. The complaint was referred to the Prevailing Wage Appeals Board, which treated it as a "Petition for Declaratory Order" and heard oral argument. Bell Telephone Co., an employer that performs public work, also participated in the proceeding. The petitioners argued that the line-item approach was not the best interpretation of the Prevailing Wage Act, that it was unfair to non-union and non-local contractors, and that it was preempted by ERISA. The Prevailing Wage Division of the Department of Labor and Industry (the Division) conceded that the Prevailing Wage Act did not require line-item specification of fringe benefits, but stated that as remedial legislation it should be interpreted broadly in favor of the protected class.[7]

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6. For example, a prevailing minimum wage predetermination for a particular classification of worker on a public works project might be $7 cash, $2 pension, and $1 health-and-welfare, per hour. An employer could pay as specified in the predetermination — $7 per hour cash, $2 pension, and $1 health-and-welfare — or substitute cash for some or all of the prevailing benefits — for example, $8 cash, $1 pension, and $1 health-and-welfare, or $10 cash and no benefits. However, an employer paying $7 cash, $2 pension, and $1 for apprenticeship-and-training would not satisfy the minimum, because it had neither contributed $1 for health-and-welfare nor replaced it with $1 cash. Similarly, an employer paying $7 cash and $3 pension would not be in compliance — notwithstanding the extra dollar in the pension category; it too would be required either to pay $1 health-and-welfare or replace that contribution with $1 cash.

7. John T. Kupchinsky, attorney for the Division, stated, "If you're going to

(Cont'd)

On April 13, 1992, apparently in response to the petitioners' ERISA preemption arguments, the Prevailing Wage Appeals Board issued a Declaratory Order modifying the implementation of the Prevailing Wage Act. The Board stated it "should interpret state law so that it comports with constitutional and federal law," Keystone App. at 71, and established a special bona fide status for contributions for ERISA benefits. It ordered:

> 2. That the [Prevailing Wage] Division must determine, in the first instance, whether or not a contribution for employee benefits isbona fide;
>
> 3. That a contribution is bona fide if that contribution: (a) is made to an "employee benefit plan" or fund or program subject to the [ERISA]; (b) has been determined to be bona fide by the Division; and (c) is not required by federal, state or local law;
>
> . . . .

Keystone App. at 73-74.

The next part of the order, paragraph 4, appears to abolish the line-item system, although it is not clear if this applies only to the ERISA benefit contributions discussed in paragraph 3, or to all benefits. It provides:

(Cont'd)
fudge things, you fudge things to get more people covered by the act . . . ." Transcript of Oral Argument before Prevailing Wage Appeals Board, Nov. 12, 1991 at35, Keystone App. at 180.

> 4. That credit for contributions for employee benefits, up to the maximum established by the predetermination, shall be given as follows:
>
> . . .
>
> c) Credit shall be given for contributions in each predetermined category up to the predetermined rate for each category;
>
> d) Contributions which exceed the predetermined rate in any employee benefit category shall be credited in any other predetermined benefit category (or categories) for which the predetermined rate has not been satisfied;
>
> e) Credit shall be given for contributions for employee benefits not included in the predetermined benefit categories;
>
> f) The maximum credit for contributions for employee benefits shall not exceed the total amount of contributions for employee benefits established by predetermination;
>
> . . . .

Keystone App. at 74-75.

As interpreted by the Prevailing Wage Division, the Declaratory Order establishes that any contribution to an ERISA plan is per se bona fide, while other benefits contributions must be certified by the Division as such. Furthermore, ERISA benefits contributions are counted toward the benefits minimum no matter what category they fall in, while the line-item approach is maintained for non-ERISA benefits contributions. Letter from Susan J. Forney, Senior Deputy Attorney General, to the Court, (April 18, 1994).[8] We accept this reading of the Declaratory Order as a reasonable interpretation.[9]

D. Litigation

Keystone filed a complaint in United States District Court for the Middle District of Pennsylvania seeking injunctive relief against the Secretary. Keystone claimed the Prevailing Wage Act was preempted by ERISA because it prevented employers from setting the terms of their benefits plans. Bell Telephone and its employees' union, the Communications Workers of America (CWA), brought a suit against the Secretary and the members of the Prevailing Wage Appeals Board seeking a declaratory judgment that the Prevailing Wage Act was preempted by ERISA or by the NLRA.[10] They claimed their participation in public works projects was impeded because their collective bargaining agreements, which include centrally administered benefits plans for workers in several states, would not qualify as meeting the prevailing wage. Some of these contracts included non-ERISA benefit contributions that they believed would not be credited toward the benefits component, and some contracts gave benefits in excess of the prevailing benefits minimum that would not be credited against the cash wage component. Keystone, Bell, the CWA, and the defendants moved for summary judgment.

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[8] A May 29, 1992 memo from Field Inspection Supervisor A. Robert Risaliti to the Field Inspectors, who enforce the Prevailing Wage Act, confirms that the Declaratory Order has been thus implemented. It states that neither the Division nor the inspector is authorized to object to the presumed bona fide status of ERISA contributions, whether or not the contributions match the categories in the predetermination. The memo also indicates the line-item approach is still applied to non-ERISA benefits.

Ms. Forney's letter came as a correction to the Secretary's position at oral argument, that pursuant to the April 13 Order the line-item approach was abandoned for all benefits, and that any non-ERISA benefit contributions are credited against the benefit contribution rate if they were judged by the Division to be bona fide. *See* Brief for Appellants at 10-11.

[9] The Appellees differ in their interpretation of the order. Keystone essentially agrees with the Secretary's interpretation. Bell and the CWA contend that only contributions to ERISA benefit plans now count towards the fringe benefit component; other benefits, they say, will not be credited at all. Although the order is somewhat unclear, we find it implausible that the Board would disqualify all non-ERISA benefits contributions from counting toward the prevailing minimum, as this would be a major departure from past practice without grounding in the Act.

On July 30, 1993, the district court declared the Prevailing wage Act, its accompanying regulations, and the Declaratory Order preempted by § 514(a) of ERISA, 29 U.S.C. § 1144(a) (1988), which preempts state law relating to ERISA plans. The court found (1) the Declaratory Order specifically referred to ERISA plans, (2) the Prevailing Wage Act could affect the level of benefits paid to employees by discouraging benefits in excess of the prevailing rate, and (3) the Act imposed administrative burdens on ERISA plans by requiring employers to keep records of wages and benefits. The court declined the Secretary's request to sever the portion of the Act covering fringe benefits and leave standing a requirement that government contractors simply meet the prevailing cash wage because it believed such a system would be contrary to legislative intent.

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[10] The latter claim was dismissed and is not raised on appeal.

On appeal, the Secretary argues the district court erred in finding the Prevailing Wage Act, its regulations, and the Declaratory Order preempted. Alternatively, he requests that if the Act's integration of benefits into the prevailing wage violates ERISA, we sever that portion and allow the Act to stand to the extent it regulates cash wages. Keystone and Bell ask us to affirm the district court. Keystone also cross-appeals, requesting that if we do not affirm the district court, we enjoin the Secretary from specifying line-item requirements for ERISA benefit contributions. The CWA requests that only the Declaratory Order be invalidated, claiming the law itself can be interpreted in a manner that is not preempted.

The district court had jurisdiction of these ERISA preemption claims under 28 U.S.C. § 1331 (1988). "A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14.[11]

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[11] Steamfitters Local Union No. 420, in its amicus brief, argues that *New Jersey State AFL-CIO v. New Jersey*, 747 F.2d 891 (3d Cir. 1984), bars federal question jurisdiction. While we held there that a district court lacked jurisdiction of a labor union's action for declaratory judgment that ERISA preempted four New Jersey statutes, our holding simply rejected the union's attempt to sue under ERISA's jurisdictional provision, 29 U.S.C. § 1132(a)(1)(B) & (e)(1), which grants federal jurisdiction of civil actions only by participants and beneficiaries. *New Jersey State AFL-CIO*, 747 F.2d at 892-93. As we explained in *Northeast Dept. ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147, 153 n.3 (3d Cir. 1985), "[t]he matter of federal question jurisdiction was not raised by the parties in *AFL-CIO*, nor was it considered by the panel." *Shaw*, as quoted above, makes clear that there is federal question jurisdiction where a party claims it will be subject to state regulation preempted by ERISA.

We have appellate jurisdiction under 28 U.S.C. § 1291, and our review of a summary judgment is plenary, *Public Interest Research v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991). "[T]he appellate court is required to apply the same test the district court should have utilized initially. Inferences to be drawn from the underlying facts contained in the evidential sources submitted to the trial court must be viewed in the light most favorable to the party opposing the motion." *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). The district court's conclusions of law are subject to plenary review. *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1370 (3d Cir.), *cert. denied*, 498 U.S. 899 (1990).

II.

A. ERISA

ERISA provides uniform federal regulation of employee benefit plans. It is a comprehensive statute that protects the interests of employees and their beneficiaries in employee benefit plans, and promotes administrative efficiency through exclusive federal regulation of such plans. ERISA subjects employee benefit plans to participation, funding, and vesting requirements, and to uniform standards on matters like reporting, disclosure, and fiduciary responsibility. *Shaw*, 463 U.S. at 90-91.

Section 514(a) of ERISA promotes uniform regulation of employee benefits plans, by preempting, with limited exceptions not applicable here, "any and all State law insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a). ERISA covers pension benefit plans and plans for welfare benefits such as medical benefits, training programs, and daycare centers.[12] 29 U.S.C. § 1002(3) (1988). Typically, these plans create a need for "an ongoing administrative program for processing claims and paying benefits." *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1, 12 (1987).

In determining the scope of § 514(a), "as in any preemption analysis, '[t]he purpose of Congress is the ultimate touchstone.' " *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 747 (1985) (quoting *Malone v. White Motor Corp.,* 435 U.S. 497, 504 (1978)) (alteration in original) (internal quotation marks and citation omitted). Recognizing the complex administrative task faced by employers maintaining employee benefit plans, Congress enacted § 514(a) to ensure that plan administration is subject to a single set of regulations rather than a "patchwork scheme." *Fort Halifax,* 482 U.S. at 11.

We summarized the standards for ERISA preemption in

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[12] The statute defines "employee benefit plan" as an "employee welfare benefit plan or an employee pension benefit plan or a plan which is both." 29 U.S.C. § 1002(3). An employee welfare benefit plan is any "plan, fund, or program . . . established or maintained by an employer or by an employee organization, or by both" to provide "(A) medical, surgical, or hospital care or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions)." *Id.* § 1002(1). 29 U.S.C. § 186(c) involves union welfare funds for benefits such as vacation benefits, scholarships, and housing assistance. An employee pension benefit plan is "any plan, fund, or program . . . established or maintained by an employer or by an employee organization, or by both . . . [that] (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond . . . ." *Id.* § 1002(2)(a).

United Wire v. Morristown Memorial Hosp., 995 F.2d 1179 (3d Cir.), *cert. denied*, 114 S. Ct. 382, 383 (1993):

> The preemption clause of ERISA is notable for its breadth, and manifests Congress's intention to establish pension plan regulation as an exclusively federal concern. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981). The Supreme Court has noted that a state law "relates to" an ERISA governed plan, within the meaning of § 514(a)'s preemptive reach, "if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines*, 463 U.S. 85, 97, 103 S.Ct. 2890, 2900, 77 L.Ed.2d 490 (1983). The Court in *Shaw* noted, however, that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." 463 U.S. at 100, n. 21, 103 S.Ct. at 2901 n.21.

Id. at 1191. We then set out guidelines for determining if a law related, directly or indirectly, to ERISA plans:

> A rule of law relates to an ERISA plan if it is specifically designed to affect employee benefit plans, if it singles out such plans for special treatment, or if the rights or restrictions it creates are predicated on the existence of such a plan. . . .
>
> This does not end our inquiry, however. A state rule of law may be preempted even

> though it has no such direct nexus with ERISA plans if its effect is to dictate or restrict the choices of ERISA plans with regard to their benefits, structure, reporting and administration, or if allowing states to have such rules would impair the ability of a plan to function simultaneously in a number of states.

Id. at 1192-93 (footnotes omitted). We will apply this analytic framework to the Declaratory Order, the Prevailing Wage Act, and its accompanying regulations.

B. The Declaratory Order

The District Court correctly held that ERISA preempts the Declaratory Order, because it "singles out [ERISA] plans for special treatment."[13] *United Wire,* 995 F.2d at 1192. Under the Order, the Prevailing Wage Division treats contributions for ERISA benefits as per se bona fide, but must approve other contributions. Further, any ERISA benefits contributions count toward the benefits minimum, while non-ERISA benefits only count if they are in one of the benefit categories listed in the predetermination.

Such special treatment for ERISA plans is grounds for preemption. In *Mackey v. Lanier Collection Agency & Serv.,* 486

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[13] The Declaratory Order is "State law" subject to ERISA preemption under § 514, for "State law" includes not only statutes, but "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." 29 U.S.C. § 1144(c)(1). *See National Elevator Indus., Inc. v. Calhoon,* 957 F.2d 1555 (10th Cir.) (invalidating ruling of Commissioner of Oklahoma Department of labor under state's prevailing wage act as preempted by ERISA), *cert. denied,* 113 S. Ct. 406 (1992).

U.S. 825 (1988), the Supreme Court struck down a provision of a Georgia statute that barred garnishment of ERISA plan funds. Because the provision expressly referred to ERISA benefit plans and accorded them special treatment, the Court found it "related to" such plans within the meaning of § 514(a). *Id.* at 829-30. Though the law might have been enacted to further ERISA's purposes, the Court said, "[l]egislative 'good intentions' do not save a state law within the broad pre-emptive scope of § 541(a)." *Id.* at 830. *See also McCoy v. Massachusetts Inst. of Tech.*, 950 F.2d 13, 19-20 (1st Cir. 1991) (§ 514(a) preempts mechanics' lien law expressly inuring lien to advantage of various types of ERISA plans), *cert. denied,* 112 S. Ct. 1939 (1992).

Here, too, there may have been "good intentions' behind the special treatment given to ERISA plans. The Prevailing Wage Appeals Board was responding to a claim that the Prevailing Wage Act was preempted by ERISA, and stated its intention to "interpret state law so that it comports with constitutional and federal law." Declaratory Order at 2. Despite this effort, the Board interpreted the Prevailing Wage Act in a way that is preempted by ERISA.[14]

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[14] Amicus Curiae, the Roofing Contractors Association, argues that preemption should not apply to state actions where the state is acting as a proprietor. Because we find the Prevailing Wage Act and its accompanying regulations not preempted on other grounds, this argument could only affect our decision regarding the Declaratory Order. The Association relies on *Building & Constr. Trades Council v. Associated Bldrs. and Contractors,* 113 S. Ct. 1190 (1993), in which the Supreme Court held a bid specification by a Massachusetts state authority, requiring bidders to abide by a particular labor agreement, was not preempted by the National Labor Relations Act, despite the argument that the bid specification was a state intrusion into labor-management relations, a regulatory realm preempted by the federal government under the NLRA.

The Supreme Court rejected the preemption claim because the state was (Cont'd)

C. The Act and its accompanying regulations

Although the Declaratory Order implemented the Prevailing Wage Act in a manner preempted by ERISA, we hold that neither the Prevailing Wage Act nor its accompanying regulations are preempted. Under at least one reasonable interpretation of the Act and regulations, an interpretation the Agency is free to adopt, the Act and regulations merely require that the Secretary set a prevailing wage that consists of a cash component and may include a benefits component. Employers must pay the cash component of the wage in cash, but they may pay the benefits component either in benefits or cash. Any benefits they provide, regardless of type, would count toward the benefits component.[15]

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acting "as a market participant with no interest in setting policy," rather than in "a role that is characteristically governmental." *Id.* at 1197. The Court explained that when a state acts in the market place as an owner and manager of property, it "is not subject to pre-emption by the NLRA, because pre-emption doctrines apply only to state regulation." *Id.* at 1196.

Were we to reach the merits of this novel argument, we would have to begin by considering the differences between preemption under the NLRA, which has no explicit preemption provision, and preemption under ERISA, whose preemption clause is expansive. We need not pursue the inquiry, however, because the theory could not apply here in any event. In applying the Prevailing Wage Act, Pennsylvania is clearly acting with an "interest in setting policy," not as a proprietor. *Id.* at 1197. The Prevailing Wage Act aims to ensure that workers receive adequate wages, a governmental objective. Throughout its brief, the state justifies its action in terms of its "right to establish labor standards," which it calls a "traditional police power." Brief for the Appellants at 14-15. It would be difficult for the state to claim it is acting as a private market participant when it is making rules that raise the cost of its contracts.

[15] We read the Prevailing Wage Act as a statute that may properly be implemented in a number of ways, so that in overturning the Declaratory Order we
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Under this interpretation, the Prevailing Wage Act and the regulations do not control benefits, but rather require certain wages to be paid.

The Act and regulations thus fall into the field of state regulation of wages, which is one of those "areas of traditional state regulation" that we "must presume that Congress did not intend to pre-empt." *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 740 (1985). That presumption is rebuttable, however, for "to avoid being preempted, a state law in addition to being an exercise of traditional police powers must also affect the plan 'in too tenuous, remote or peripheral a manner to warrant a finding that the law "relates to" the plan.' " *Gilbert v. Burlington Indus., Inc.,* 765 F.2d 320, 327 (2d Cir. 1985) (quoting *Shaw,* 463 U.S. at 100 n.21), *aff'd,* 477 U.S. 901 (1986). Nevertheless, the state law at issue here avoids preemption because it does not impede the goals of ERISA and has only incidental and insignificant relations to ERISA plans.

1. Direct relation

The Prevailing Wage Act and regulations lack any of the

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need not invalidate the Prevailing Wage Act itself or its regulations. We see nothing in the Act or the regulations requiring that the benefits component specify particular types of benefits and the amounts to be contributed in each. The variety of official interpretations given the Prevailing Wage Act at different times shows that the Secretary and the Prevailing Wage Appeals Board also believe line-item specification of benefits is but one of the approaches at their disposal under the Act. *See supra,* note 5.

There may be other interpretations of the statute that are not preempted. Because there is one such reasonable interpretation, the Act and regulations themselves are not preempted.

three types of direct relations to ERISA plans described in *United Wire. See supra* at 14. The Act and regulations are not "specifically designed to affect employee benefit plans." *United Wire,* 995 F.2d at 1192. The Act aims to protect workers on public projects from substandard pay by requiring a minimum cash wage that may be supplemented by either prevailing benefits or their cash equivalent. Neither the Act nor its regulations require that certain benefits plans be established, that certain benefits be given, or that ERISA plans be administered in a certain way.

The Act and regulations do not "single[] out [ERISA] plans for special treatment," or even refer to such plans. *United Wire,* 995 F.2d at 1192. Rather, they merely refer to employee benefits, with no distinction between ERISA and non-ERISA benefits. The Supreme Court has rejected the argument "that ERISA forecloses virtually all, state legislation regarding employee benefits," and instead directs us to inquire whether the state law "relates to" ERISA benefit plans. *Fort Halifax,* 482 U.S. at 7. While some of the benefits the Secretary is permitted to count in calculating the prevailing wage will come from ERISA plans,[16] we do not believe ERISA requires a state to ignore the existence of ERISA benefits when considering overall remuneration to workers. The Court has allowed the inclusion or implication of ERISA plans in generally valid state legislation. *See, e.g., Mackey,* 486 U.S. at 830-841 (approving garnishment law that would apply to ERISA plan benefits as well as other assets of debtors); *Shaw,* 463 U.S. at 106-08 (approving disability benefits requirements that could be satisfied through ERISA plans). Indeed, *Mackey* suggests that a law would be preempted if it counted all remuneration to workers *except* benefits from ERISA plans, for this would be special treatment.

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[16] Indeed, one regulation gives examples of employee benefits that include benefits which would come from ERISA plans, such as "retirement and pension benefits." 34 Pa. Code § 9.102. While the Supreme Court has held a statute's reference to ERISA plans grounds for preemption, *District of Columbia v. Greater Washington Bd. of Trade,* 113 S. Ct. 580 (1992), as discussed below, that statute referred only to the ERISA plan as the basis for the rights it accorded. But the listing of an ERISA plan benefit as an *example* of the factors to be calculated into a broader determination, such as a prevailing wage, is in and of itself inconsequential. We have held that "[w]here, as here a reference to an ERISA plan can be excised without altering the legal effect of a statute in any way, we believe the reference should be regarded as without legal consequence for § 514(a) purposes." *United Wire,* 995 F.2d at 1192 n.6.

Finally, although ERISA plans are within the scope of the regulator's consideration under the Prevailing Wage Act, the Act does not create a legislative scheme in which an ERISA plan is so central that "the rights or restriction [the law] creates are predicated on the existence of such a plan." *United Wire,* 995 F.2d at 1192. An example of a law predicated on ERISA plans was the statute in *Greater Washington Bd. of Trade,* 113 S. Ct. at 584, which required health coverage for injured employees on workers' compensation to be equivalent to regular employees' "existing health insurance coverage." Such coverage was, in turn, "a welfare benefit plan under ERISA," so that injured employees' rights were premised on the existence of ERISA plans. *Id.* Similarly, in *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133, 139-140 (1990), the Court held ERISA preempted a state cause of action in favor of an employee who alleged his employer terminated him to avoid contributing to his pension plan, where "the existence of a pension plan [was] a critical factor in establishing liability."

In *United Wire* we set out a test to distinguish between laws predicated on ERISA plans and laws that implicated such plans in a nonessential manner. A New Jersey statute set hospital rates for all payors, and included a surcharge to compensate hospitals for their losses in providing care to Medicare patients. While the dissent argued that New Jersey's system for funding underreimbursed care would not be viable without the participation of ERISA plans, *United Wire,* 995 F.2d at 1199-1200 (Nygaard, J., dissenting), we stated:

> [I]t is of no legal consequence if removing ERISA plans from the scene would diminish the likelihood that the statute would meet its social goals. Rather, the test for preemption in this regard is whether the existence of ERISA plans is necessary for the statute to be meaningfully applied.

Id. at 1192 n.6. Because the New Jersey law set standard rates and surcharges for all payors, we held it could be meaningfully applied in the absence of ERISA plans. *Id.*

In the absence of ERISA plans, the Prevailing Wage Act could be meaningfully applied. The Act requires the Secretary to measure prevailing benefits contributions in a locality for a given class of worker. The Secretary would do so even if all of these were non-ERISA benefits — that is, benefits "payable on a regular basis from the general assets of the employer," *Massachusetts v. Morash,* 490 U.S. 107, 116 (1989), and that "create[ ] no need for an ongoing administrative program for processing claims and paying benefits," *Fort Halifax,* 482 U.S. at 12. Similarly, the statute would be "meaningfully applied" in the absence of ERISA plans if a public works contractor satisfied the benefits component of a given prevailing wage by making contributions for non-ERISA benefits, or by paying the equivalent in cash. Thus, no element of the Prevailing Wage Act is premised on the existence of an ERISA plan.

2. Indirect relation

We next determine whether there is an indirect relation to ERISA plans requiring preemption. "ERISA pre-empts any state law that refers to or has a connection with covered benefit plans (and that does not fall within a § 514(b) exemption) 'even if the law is not specifically designed to affect such plans, or the effect is only indirect,' and even if the law is 'consistent with ERISA's substantive requirements.' " *Greater Washington Bd. of Trade,* 113 S. Ct. at 583 (citations omitted). ERISA preempts laws that "dictate or restrict the choices of ERISA plans with regard to their benefits, structure, reporting and administration," or "impair the ability of a plan to function simultaneously in a number of states." *United Wire,* 995 F.2d at 1193. Here, however, the only connections between ERISA plans and the Act are "too tenuous, remote, or peripheral . . . to warrant a finding that the law 'relates to' the plan." *Shaw,* 463 U.S. at 100, n.21.

State laws are preempted because they dictate or restrict ERISA plans when, for example, they eliminate a method of calculating benefits in ERISA plans that is permitted by federal law, *FMC Corp. v. Holiday,* 498 U.S. 52 (1990) (state law prohibiting ERISA plans from requiring reimbursement of benefits from beneficiaries who recover in tort for the same expenses preempted by ERISA); *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504 (1981) (state law prohibiting offset of workers' compensation awards against retirement benefits preempted by ERISA). A state cannot require an employer to contribute to certain ERISA plans, *Local Union 598 v. J.A. Jones Constr. Co.,* 846 F.2d 1213 (9th Cir.) (state prevailing wage statute requiring contributions to apprenticeship program, an ERISA plan, preempted), *aff'd* 488 U.S. 881 (1988), or to provide certain benefits through an ERISA plan. *Standard Oil Co. v. Agsalud,* 633 F.2d 760 (9th Cir. 1980) (Hawaii law requiring comprehensive health benefits for all workers preempted), *aff'd,* 454 U.S. 801 (1981). One court has held that favoring one ERISA plan over another through financial incentives is barred. *National Elevator Industry, Inc.*, 957 F.2d at 1559 (Oklahoma prevailing wage law allowing reduced trainee wages only for participants in certain ERISA training programs preempted).

a. Cash component

The primary restriction imposed by the Prevailing Wage Act is that employers on public contracts pay the predetermined prevailing minimum wage which, as we have described, has a cash component and a benefits component. We will consider each component in turn. The cash component fixes a minimum cash wage that must be paid, regardless of benefits contributions. This does not dictate or restrict the choices of ERISA plans, directly or indirectly. Employers must pay the cash minimum, regardless of what benefits they provide.

Appellees argue that the Prevailing Wage Act restricts their choice of plan benefits and structure because employers are not given credit for benefits contributions beyond the prevailing benefits minimum. This, they say, makes it difficult for a single plan "to function simultaneously in a number of states." *United Wire,* 995 F.2d at 1193. Bell explains that it negotiates uniform contracts with its workers in several states that may award lower wages and higher benefits than those called for in the prevailing minimum wage for a particular public works project. In this case, Bell says it would be forced to continue the benefits contributions it had agreed to in its national contract, but also raise its wages on the public works project.

Ironically, the Appellees here are objecting to an aspect of the Prevailing Wage Act that does not relate *enough* to employee benefits and benefit plans for their taste. They would like the level of cash wages required to be tied to the level of benefits paid by an employer, but the state has chosen to fix the cash wage component independent of benefits contributions. A state law does not dictate or restrict the choices of ERISA plans by having nothing to do with employee benefits.

The flaw in Appellees' objection is that it could be raised even against a prevailing hourly cash wage law with no benefits component. Such a law would create the same "disincentive" against awarding benefits, because employers would have to pay the wage no matter what level of benefits they provided. We do not believe ERISA preempts such basic state wage regulation. "The States have traditionally regulated the payment of wages," and the Supreme Court has not found "any indication that Congress intended such far-reaching consequences" as the preemption of this sphere of state authority. *Massachusetts v. Morash,* 490 U.S. at 119. *See also* 29 C.F.R. § 2510.3-1(b) (1993) ("employee welfare benefit plan" does not include "[p]ayment by an employer of compensation on account of work performed by an employee."). ERISA does not preempt cash wage requirements unrelated to employee benefits, nor does it require the state to encourage benefits contributions by reducing the minimum cash wage where an employer makes large benefits contributions.[17]

Plainly, a minimum cash wage requirement will impose an additional cost on a Pensylvania public works contractor which would otherwise pay less than the minimum, and this cost, like any other imposed on an employer, could influence its choices regarding ERISA benefits contributions. But this could be said of any wage regulation. For example, the Supreme Court upheld a Massachusetts statute that required employers to pay employees for all unused vacation time upon discharge, because the law was an instance of wage regulation and did not relate to employee benefit plans. *Morash,* 490 U.S. 107. And the Maine statute upheld in *Fort Halifax* required employers to give a severance payment of one week's salary for every year an employee had worked in the event of a plant closing. 482 U.S. at 3-4. The severance payment represented "a one-time obligation . . . creat[ing] no need for an ongoing administrative program for processing claims and paying benefits," and hence did not relate to an ERISA plan. *Id.* at 12. Both laws constrained employers' choices regarding wages and non-ERISA benefits, and could indirectly affect their decisions as to what ERISA benefits to offer employees. However, wage laws are among the "many forms of state regulation under the police power which result in increases in the cost of doing business." *United Wire,* 995 F.2d at 1196, and this incidental effect does not create a preemptible relation to ERISA plans.[18] ERISA's preemption clause aims "to ensure benefit plans will be governed by only a single set of regulations," *FMC Corp. v. Holliday,* 498 U.S. 52, 60 (1990), not to bestow on employers a uniform regulatory and economic environment for all their activities across the country. Because states enact their own wage and non-ERISA benefits regulations, *Morash,* 490 U.S. 107; *Fort Halifax,* 482 U.S. 1; *Shaw* 463 U.S. 85 collections law, *Mackey,* 386 U.S. 825, and controls on hospital charges, *United Wire,* 995 F.2d 1179, employers must adjust their operations according to locale. This administrative and financial burden arises from the "patchwork scheme" of our

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[17] Through the benefits component, the state has in fact extended employers the option of paying *part* of the minimum wage through cash or benefits. As discussed below, we find this permissible under *Shaw,* 463 U.S. 85. *See infra* at II(C)(2)(b). The state is, however, under no obligation to offer employers this choice, and may require all or, as here, part of a minimum wage to be paid in cash.

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[18] While state regulations may affect the cost of doing business in a state, they may not, consistent with ERISA, place administrative burdens and costs on ERISA plans that make it impractical for an employer to provide a nationwide plan. Thus, the *Fort Halifax* court stated. "Faced with the difficulty or impossibility of structuring administrative practices according to a set of uniform guidelines, an employer may decide to reduce benefits or simply not to pay them at all."). 482 U.S. at 13. Similarly, the *Holliday* Court stated, "To require plan providers to design their programs in an environment of differing state regulations would complicate the administration of nationwide plans, producing inefficiencies that employers might offset with decreased benefits." 498 U.S. at 60.

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State regulation may also be preempted for imposing costs directly on core functions of ERISA plans. For example, in *E-Systems, Inc. v. Pogue,* 929 F.2d 1100 (5th Cir. 1991), *cert denied,* 112 S. Ct. 585 (1991), the court held ERISA preempted a state tax on fees for services to ERISA plans and benefits paid by ERISA plans. The Second Circuit went farther in *Travelers Ins. Co. v. Cuomo,* 14 F.3d 708 (2d Cir. 1993) (criticizing *Rebaldo v. Cuomo,* 749 F.2d 133 (2d Cir. 1984), *cert. denied,* 472 U.S. 1008 (1985)), where it overturned a New York law that added various surcharges to hospital bills of patients covered by commercial insurance carriers and health maintenance organizations. Because the surcharges imposed "a significant economic burden on commercial insurers and HMOs," the court found they had "an impermissible impact on ERISA plan structure and administration." *Id.* at 721.

It is not clear whether *Travelers Ins.* directly conflicts with *United Wire. See Travelers Ins.,* 14 F.3d at 721 n.3 (arguing *United Wire* interprets preemption clause too narowly). Unlike the statute in *Travelers Ins.,* the New Jersey law in *United Wire* imposed a surcharge on all payors, not just commercial insurers and HMOs, and gave discounts only for "quantifiable economic benefits rendered to the institution or to the health care delivery system taken as a whole." *United Wire,* 995 F.2d at 1189 (citation omitted). Thus, the law might more legitimately be regarded as one of general application rather than one specifically affecting ERISA plans; it may also have had a less significant economic effect on such plans. As we stated in *United Wire,* general legislation under a state's police power may raise the cost of doing business for ERISA plans without triggering preemption. But in any event, the Prevailing Wage Act has a far less direct economic impact on ERISA plans than either of the hospital rate laws; because in essence the Act imposes only a wage requirement, it changes employers' wage costs, not ERISA plan costs.

federal system, a system whose "separate spheres of governmental authority," *Alessi*, 451 U.S. at 522, were not preempted by ERISA.

b. Benefits component

Unlike the cash component, the benefits component of the prevailing minimum wage plainly has some connection to employee benefits, and thus to benefits plans, but we find no grounds for preemption here, either. Contracts for public works must either provide benefits contributions at the level determined in the prevailing wage or the monetary equivalent thereof. 34 Pa. Code § 9.106. Appellees suggest this provision creates a preemptible relation to ERISA plans merely by providing the option of complying with part of the minimum wage through benefits contributions. We disagree. The provision does not require or encourage an employer to provide certain benefits, to alter the manner in which it provides benefits, or even to provide any benefits at all. The benefits component only relates to ERISA plans when an employer decides to satisfy it through contributions to ERISA plans instead of cash payments or contributions to non-ERISA benefits. Where a legal requirement may be easily satisfied through means unconnected to ERISA plans, and only relates to ERISA plans at the election of an employer, it "affect[s] employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw*, 463 U.S. at 100 n.21.

We are guided by *Shaw*, where the Court held ERISA did not preempt a New York law requiring employers to pay sick-leave benefits to employees unable to work because of pregnancy. Section 4(b)(3) of ERISA exempts from the statute any plan "maintained solely for the purpose of complying with applicable . . . disability insurance laws," 29 U.S.C. § 1003(b)(3); such plans may therefore be regulated by the state. The Court held § 4(b)(3) only saved from preemption plans solely devoted to disability benefits and did not exempt a plan that included provisions for benefits subject to ERISA along with provisions intended to comply with state disability laws. *Id.* at 106-07. However, the Court held that because § 4(b)(3) allowed New York to require employers to provide certain benefits in a non-ERISA plan — one solely devoted to disability benefits — it could also offer them the *option* of providing those benefits along with non-disability benefits in an ERISA plan. Thus,

> while the State may not require an employer to alter its ERISA plan, it may force the employer to choose between providing disability benefits in a separately administered plan and including the state-mandated benefits in its ERISA plan. If the State is not satisfied that the ERISA plan comports with the requirements of its disability insurance law, it may compel the employer to maintain a separate plan that does comply.

Id. at 108. The benefits component of the prevailing minimum wage extends to employers a similar choice. A state requirement that an employer pay a minimum cash wage does not relate to ERISA plans. The benefits component represents a sum of money an employer may pay either through cash wages or through benefits contributions, some of which may be toward ERISA plans. To paraphrase *Shaw,* if the state is not satisfied that the amount of benefits contributions satisfies the total wage requirement, it compels the employer to pay greater cash wages.

Thus, when Appellees complain the Prevailing Wage Act impermissibly subjects their ERISA plans to different regulations in Pennsylvania than elsewhere, they are speaking of a law requiring only that when their benefits contributions fall short of the prevailing minimum, theymay make up the difference with cash.[19] Like the New York law in *Shaw*, the Prevailing Wage Act is not preempted because an employer may comply without making any adjustment in its ERISA plans. Unless the employer chooses otherwise, the benefits component imposes a cash wage requirement, and it is of no consequence that this requirement is particular to Pennsylvania public works projects — as discussed above, ERISA does not preempt a state's power to set a minimum cash wage. *See supra* at II(C)(2)(a).

Some of Appellees' objections are levelled at the line-item approach to the Prevailing Wage Act, which was in effect for all benefits before the Declaratory Order was issued, and continued for non-ERISA benefits thereafter. We acknowledge this would be a differenct case if the Act required line-item specification in the benefits component.[20] We believe a state can set a minimum cash wage, and allow an employer the option of paying part of that in benefits. We doubt, however, a state could also specify that only particular benefits plans over others.[21] Line-item specification would effectively create a cash incentive to award the predetermined benefits and not others, and to award certain amounts of those benefits and no more. As the Court of Appeals for the Tenth Circuit said:

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[19] They also admit they could simply decline to participate in public works contracts.

[20] *See supra* note 15.

[21] For example, a predetermination for Common Heavy & Highway Laborers reproduced in the joint appendix gives hourly prevailing minimums for health and welfare benefits, pension benefits, and education, but nothing for the other eight categories, such as apprenticeship and training, vacation, or legal services. Under the line-item approach, the contractor hiring a Common Highway

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> We accept, as a general proposition, the state's right to regulate wages. But a wage law that provides an option favoring certain ERISA plans and benefits . . . over other ERISA plans and benefits . . . is not a law of "general application" and may be used to effect change in the administration, structure and benefits of an ERISA plan.

National Elevator Indus., 957 F.2d at 1561 (holding ERISA preempted an Oklahoma law that reduced the minimum wage for employees only in a specified apprenticeship program, which was an ERISA plan). Pursuant to its power to set minimum level of remuneration to workers, a state may allow part of a minimum wage to be satisfied by benefits contributions. But the state asserts an additional power, the power to determine what benefits workers should receive, when it gives preferred status to some benefits over others in a minimum wage scheme. This power is not left to the states under ERISA.[22]

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Laborer would get a wage offset by paying him up to $2.62 an hour in health benefits, but no offset for health benefits beyond that, and no offset for payments for apprenticeship and training.

[22] Other courts have found states may not favor one benefits plan, or one type of benefits plan, over another. In *General Electric Co. v. New York State Dep't of Labor,* 891 F.2d 25 (2d Cir. 1989), *cert. denied,* 496 U.S. 912 (1990), the court ruled ERISA preempted New York's prevailing wage law, which required benefits contributions in particular categories and amounts or their cash equivalents. The

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c. Administration

Finally, we must consider whether the Prevailing Wage Act and the accompanying regulations "dictate or restrict the choices of ERISA plans with regard to their . . . reporting and administration." *United Wire,* 995 F.2d at 1193. Administrative simplicity is one of the purposes of ERISA, and "Congress intended pre-emption to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations." *Fort Halifax,* 482 U.S. at 11. But state laws are not necessarily preempted because they impose some administrative burden on ERISA plans. The *Mackey* Court was not moved by petitioners' argument that subjecting ERISA plans to state law garnishment by creditors of plan participants would also create "substantial administrative burdens and costs" when "plan trustees are served with a garnishment summons, become parties to a suit, and must respond and deposit the demanded funds due the beneficiary-debtor." *Mackey,* 486 U.S. at 831. We think preemption is not required where a state law places administrative requirements on ERISA plans so slight that the law "creates no impediment to an employer's adoption of a uniform benefit administration scheme." *Fort Halifax,* 482 U.S. at 14. *See also Aetna Life Ins. Co. v. Borges,* 869 F.2d 142, 146-47 (2d Cir.) ("What triggers ERISA preemption is not just any indirect effect on administrative procedures but rather an effect

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court found the law objectionable for a number of reasons, including the fact that the law effectively prescribed "the type and amount of an employer's contributions to a plan," and "the nature and amount of benefits thereunder." *Id.* 891 F.2d at 29. (The *General Electric* court also objected to the administrative burden imposed on employers by the New York law. *Id.* It is not clear whether the court would have found the law acceptable if line-item compliance in the benefits package had not been required.) *See also Local Union 598 v. J.A. Jones Constr. Co.,* 846 F.2d 1213 (9th Cir.), *aff'd* 488 U.S. 881 (1988) (discussed *supra* at 20-22).

on the primary administrative functions of benefit plans, such as determining an employee's eligibility for a benefit and the amount of that benefit.") *cert. denied,* 493 U.S. 811 (1989).

Here, the bulk of administrative burdens placed on employers by the Prevailing Wage Act do not relate to ERISA plans at all. The law requires that each contractor and subcontractor "shall keep an accurate record showing the name, craft and the actual hourly rate of wage paid to each workman employed by him in connection with public work," that the record be preserved for two years from the date of payment, and that it be open for inspection. 43 P.S.A. § 165-6. The regulations expand on this, requiring recording of personal information regarding the worker, specification of the hours worked each day, and the preservation of time cards and indentures and approvals regarding apprenticeships. 34 Pa. Code § 9.109. None of these records relates to employee benefit plans; rather, they are general employment data a state would require even if it were merely regulating cash wages.

Two minor administrative requirements are placed on ERISA plans. Under current implementation of the Act, the state must certify benefits as bona fide for them to count against the prevailing minimum benefits contribution. This apparently requires simply that the contributions actually be made to fringe benefit programs and be held for or attributed to the exclusive benefit of employees. *See* Bitzel Declaration, Bell App. at 393. The other requirement is that employers keep a record of their benefits contributions, and certify weekly to the officer disbursing public funds that they have paid wages in conformity with the contract, or indicate what wages remain unpaid.[23] 34

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[23] Presumably, "wages in strict conformity with the contract," 34 P.S.A. § 9.110(a), include contributions for benefits.

P.S.A. §§ 9.109, 9.110. We do not agree with amicus Chamber of Commerce of the United States that this entails complex, ongoing measurements for each employee. Brief for Chamber of Commerce at 16-17. The memo from Field Inspection Supervisor Risaliti indicates the Secretary approved a simple method for estimating hourly benefits contributions where premiums are paid monthly: the premium is divided by 160. Keystone App. at 80. We presume simple formulae are available for calculating the hourly and weekly value of benefits paid in other ways as well.

These records and reporting requirements entail only a slight burden. Calculating benefits paid out will not influence "decisions regarding the internal design and structure of benefit plans (e.g. who may collect, and how, and from whom)," *United Wire,* 995 F.2d at 1194 n.8, so the ease and efficiency of administering nationwide benefits plans will not be impeded. *See also Minnesota Chapter, Assoc'd Builders v. Minnesota Dep't of Labor and Industry,* Civ. No. 4-92-564, slip op. at 7, (D. Minn. April 27 1993) (Under Minnesota prevailing wage law, "[t]he requirement of calculating [the cost of benefits] falls on the employer itself, but does not place any administrative burden on the plan. The requirement of calculating costs and keeping records may somewhat increase the cost of the benefits plan, but this incidental impact on the plan need not lead to preemption."). We see no potential that the ability of plans to operate in several states will be impaired by the administrative requirements of the Prevailing Wage Act.

d. Conclusion

We acknowledge that at some point, the quantity of a law's indirect effects on ERISA plans may require preemption. For example, as we have explained, under a line-item approach the

Prevailing Wage Act would create incentives favoring some types of benefits over others, even though it would still allow employers to substitute cash for benefits, and this would appear to exceed the state's authority under ERISA. A significant, though indirect economic effect on ERISA plans could also be grounds for preemption — for example, though a state may set a minimum cash wage, if that minimum were so high that employers could not practically provide any benefits, the law might well be found to restrict the choices of ERISA plans. As we interpret the Prevailing Wage Act, however, it neither encourages nor constrains any particular kind of conduct towards ERISA plans, nor does it cross the line from wage regulation to benefit regulation — rather, while imposing a cost on employers, as any wage regulation will, the Act leaves employers free to structure benefit plans as they wish.

Furthermore, the Act and regulations represent reasonable exercises of a state's traditional power to regulate wages. ERISA, and particularly the preemption clause, were designed to ensure fairness and consistency in employee benefit plans. We see no indication, however, that in enacting ERISA, Congress expected it would require uniformity of wage regulation among the states or that its preemption provision would eviscerate state power to regulate wages.

III.

The Prevailing Wage Act and its accompanying regulations do not relate to employee benefit plans in more than a tenuous, remote, and peripheral manner. They do not refer to ERISA plans. Rather, they establish a system of wage regulation that neither burdens nor influences the benefits or structure of employee benefit plans, nor does it interfere with the uniform administration of such plans. "If a State creates no prospect of conflict with a federal statute, there is no warrant for disabling it from attempting to address uniquely local social and economic problems." *Fort Halifax*, 482 U.S. at 19.

For these reasons, we will reserve the district court's judgment to the extent it held the Prevailing Wage Act and regulations preempted. Because the Declaratory Order singles out ERISA plans for special treatment, however, we will affirm the judgment of the district court that ERISA preempts the Declaratory Order.

A True Copy
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Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA FILED JULY 30, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL NO. 92-0459
(Judge Kosik)

KEYSTONE CHAPTER, ASSOCIATED BUILDERS AND CONTRACTORS, INC., IN REPRESENTATION OF ITS MEMBERS

Plaintiff

v.

THOMAS P. FOLEY, in his official capacity as the SECRETARY OF LABOR AND INDUSTRY FOR THE COMMONWEALTH OF PENNSYLVANIA,

Defendant

CIVIL NO. 92-1105
(Judge Kosik)

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA, *et al.*,

Plaintiffs

v.

THOMAS P. FOLEY, *et al.*,

Defendants

MEMORANDUM

Before the court in each of the above-captioned actions are cross-motions for summary judgment. The issues to be decided in these motions are identical, and therefore will be discussed in this joint Memorandum.

I. *Background*

The Pennsylvania Prevailing Wage Act, 43 Pa. Stat. Ann. §§ 165-1 *et seq.* [the "Act" or the "Prevailing Wage Act"], and its accompanying regulations published at 34 Pa. Code 9.101 *et seq.*, require contractors on public works projects to pay their employees the prevailing wages for the locality where the project is located. 43 Pa. Stat. Ann. §§ 165-4, 165-5, 165-6. The Secretary of Labor and Industry is required to determine the general prevailing minimum wage rate for the locality where the project is located "for each craft or classification of all workmen needed to perform public work contracts" for the duration of the project. 43 Pa. Stat. Ann. § 165-7. In determining the prevailing wage rate, contributions toward employee benefits made pursuant to a bona fide collective bargaining agreement are to be considered and integral part of the wage rate. *Id.* The Act sets minimum wage rates to be paid on public works projects. It does not prevent contractors from paying wages in excess of those rates. *Id.*

For several years prior to April 13, 1992, the Secretary interpreted the Act as precluding a contractor from receiving any credit towards a particular fringe benefit over the amount listed for that fringe benefit in the wage determination issued for a specific project. As a result, employers were required to contribute fringe benefits precisely as mandated by the state for the particular locality, or pay a cash equivalent directly to employees. On April 13, 1992, the Prevailing Wage Appeals Board issued a Declaratory Order modifying this approach.[1] The Order states that "a contribution is bona fide if that contribution: (a) is made to an 'employee benefit plan' or a fund or program subject to the Employee Retirement Income Security Act of 1974." The Order requires contractors to separately examine and meet the wage and fringe benefit components of the prevailing wage determination. Thus, the maximum credit an employer may take for employee benefits can not exceed the total amount of contributions for the employee benefits established by the predetermination. In that light, the Declaratory Order provides that:

> No credit for contributions for employee benefits exceeding the maximum established by the predetermination shall be given and no payment in one or more employee benefit categories shall be off-set against an underpayment in wages.

An example of how the Prevailing Wage Act works is illustrative. Under the Act, for a specific project, the Secretary may determine the prevailing rate to be $20 an hour in wages and $5 an hour in fringe benefits. If an employer, pursuant to a collective bargaining agreement, pays employees $16 an hour in wages and $10 an hour in fringe benefits, however, it receives no credit for the higher payment in benefits. Under this example, the employer would be obligated to provide an additional $4 per hour in wages in order to be in compliance under the Act. Such a result may cause employers to attempt to bargain for lower benefit payments with the members of the collective bargaining group it seeks to employ on this project.

---

[1] A copy of this Declaratory Order is attached as Exhibit "A" to Keystone Chapter's Statement of Undisputed Facts, Appended to Document 37 of 92-0459.

II. *Procedural History*

The plaintiff in Civil Action Number 92-0459, Keystone Chapter, Associated Builders and Contractors, Inc., in representation of its members ["Keystone Chapter"], filed a complaint on April 8, 1992, seeking injunctive relief against defendant Thomas P. Foley, in his capacity as Secretary of Labor and Industry for the Commonwealth of Pennsylvania ["Foley"]. The gravamen of Keystone Chapter's complaint is that the Prevailing Wage Act is preempted by the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* ["ERISA"].

Plaintiffs in Civil Action Number 92-1105, Bell Telephone Company of Pennsylvania ["Bell"] and Communication Workers of America, AFL-CIO, District 13 ["Communication Workers"], filed their original complaint on August 13, 1992. An amended complaint was filed on December 11, 1992. The defendants in the amended complaint are Foley, and the individual members of the Pennsylvania Prevailing Wage Appeals Board.[2] The amended complaint, in each of two counts, sought a declaratory judgment that the Prevailing Wage Act was preempted by federal law, either by the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* [the "NLRA"], in Count I, or ERISA, in Count II. By Memorandum and Order dated March 16, 1993, we granted the defendants' motion to dismiss Count I of the complaint, concerning preemption under the NLRA.

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[2] The original complaint named the Pennsylvania Prevailing Wage Board itself as a defendant. Because of possible Eleventh Amendment barriers to naming the Board as a defendant, the plaintiffs sought, and were granted, leave to file the amended complaint. Additionally, the amended complaint does not include Count III of the original complaint, which the parties agreed would be dismissed.

On April 30, 1993, Bell and Communication Workers filed a motion for summary judgment on Count II of their complaint, claiming that ERISA preempts the Prevailing Wage Act, its accompanying regulations and the Declaratory Order of the Prevailing Wage Appeals Board dated April 13, 1992. The defendants in that action filed a cross-motion for summary judgment on the same date. Keystone Chapter filed a motion for summary judgment on May 3, 1993, on precisely the same issue. Foley filed a cross-motion in that action on April 30, 1993.

III. *Discussion*

All parties in these two actions agree that no question of material fact exists that would prevent the entry of summary judgment on the ERISA preemption issue. Thus, our task is to determine, as a matter of law, whether the Prevailing Wage Act is preempted by ERISA.

The law of ERISA preemption has recently been summarized:

> Congress enacted ERISA to subject employee benefit plans to a uniform system of federal laws governing disclosure, reporting, standards of conduct, remedies, sanctions, and access to federal courts. Since uniformity cannot be achieved if ERISA plans are subject to varying state regulations, Congress preempted "any and all State laws

insofar as they . . . *relate to* any employee benefit plans." ERISA § 514(a), 29 U.S.C. § 1144(a) (emphasis added).

Section 514(a) is deliberately expansive and "conspicuous for its breadth." *FMC Corp. v. Holliday*, 498 U.S. 52, 111 S. Ct. 403, 407 (1990). It is "virtually unique" among federal preemption statutes. *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26, 103 S. Ct. 2841, 2854 n.26, as it is "one of the broadest preemption clauses ever enacted by Congress." *Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437, 1439 (9th Cir. 1990).

The term "relate to" must be given a "broad common-sense meaning." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S. Ct. 1549, 1553 (1987). A state law relates to an ERISA plan "in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines. Inc.*, 463 U.S. 85, 103 S. Ct. 2890, 2900 (1983). Any connection may trigger preemption, and preemption is not limited to laws relating to the specific subjects covered by ERISA. *Pilot Life*, 481 U.S. at 47-48; *Shaw*, 103 S. Ct. at 2900. That a state law may be "consistent with ERISA's substantive requirements" or was enacted to "effectuate ERISA's underlying purposes" does not save it from preemption. *Metropolitan Life Ins. Co. v.*

> *Massachusetts*, 471 U.S. 724, 105 S. Ct. 2380, 2388-89 (1985); *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 108 S. Ct. 2182, 2185 (1988). A state law may relate to a benefit plan even if it is not specifically designed to affect such plans, or its effect is only indirect. *Pilot Life*, 107 S. Ct. at 1552-53; *Shaw*, 103 S. Ct. at 2900; *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S. Ct. 1895, 1907 (1981); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S. Ct. 478, 483 (1990).
>
> Since no law exists in a vacuum and arguably many laws could be held to "relate to" ERISA plans, without some limits Section 514(a) could become a legal blackhole with an attractive force no state law could resist. Hence, some laws are said to affect ERISA plans in "too tenuous, remote, or peripheral a manner to warrant a finding that [they] 'relate to' the plan." *Shaw*, 103 S. Ct. at 2901 n.21. *See, e.g., Mackey*, 108 S. Ct. at 2191 (garnishment statute of general applicability is not preempted). The task then is to determine the precise relationship between the Act and ERISA plans. *Mackey*, 108 S. Ct. at 2186.

United Wire, Metal and Machine Health and Welfare Fund v. Morristown Memorial Hosp., Nos. 92-5317/5319/5320/5241/5343/5345/5352/5354/5255, slip op. at 36-37 (3d Cir. May 14, 1993) (Nygaard, J., dissenting). Additionally, "[a] state rule of law may be preempted even though it has no such direct nexus with ERISA plans if its effect is to dictate or restrict the choices of ERISA plans with regard to their benefits, structure, reporting and administration, or if allowing states to have such rules would impair the ability of a plan to function simultaneously in a number of states." *Id.* slip op. at 28 (majority opinion). Congress passed ERISA's broad preemption provision with the recognition that "[a] patch-work scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them." *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1, 11 (1987). The Supreme Court has recently affirmed its broad interpretation of ERISA preemption in *District of Columbia v. Greater Washington Bd. of Trade*, 113 S. Ct. 580, 583 (1992).

We believe that the Pennsylvania Prevailing Wage Act, its regulations and the Declaratory Order are clearly preempted by ERISA because this state law necessarily relates to ERISA plans. In so finding, we are in accordance with other courts who have examined ERISA preemption with respect to similar prevailing wage laws. *See, e.g., General Electric Co. v. New York State Dep't of Labor,* 891 F.2d 25 (2d Cir. 1989); *Associated Builders & Contractors v. Baca,* 769 F. Supp. 1537 (N.D. Cal. 1991).

In order to comply with the Act, employers on public works projects are forced to implement an administrative scheme to calculate the wages and benefits paid to individual workers on such projects, including benefits paid under ERISA plans. In fact, the Declaratory Order makes specific references to ERISA plans in noting that they are to be taken into account. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 97, 103 S. Ct. at 2900 (a state law relates to an ERISA plan "if it has a connection with or reference to such a plan"). Contractors are required, at a minimum, to determine the cash equivalent of the benefits provided to workers on public projects. The Act therefore imposes on-going administrative burdens that fall within the parameters of ERISA plans. *See Fort Halifax*, 482 U.S. at 14 n.9 ("the ongoing, predictable nature of this obligation therefore creates the need for an administrative scheme to process claims and pay out benefits"). Such a scheme is preempted by ERISA. *See General Electric*, 891 F.2d at 29; *Associated Builders*, 769 F. Supp. at 1547.

More importantly, the Prevailing Wage Act could have an effect on the level of benefits paid to employees. Because an employer gets no credit for the amount of hourly benefits paid in excess of the prevailing rate, employers are discouraged from paying benefits at higher than the prevailing rate on public works projects. The effect of the Act is "to dictate or restrict the choices of ERISA plans with regard to their benefits." *United Wire*, slip op. at 28. Employers who also work on non-public projects may be forced to provide different levels of benefits depending on the type of project to be completed. Such a "patchwork scheme of regulation would introduce considerable inefficiency in benefit program operation." *Fort Halifax*, 482 U.S. at 11, 107 S. Ct. at 2217. Because of these effects, we find that the Prevailing Wage Act is precisely the type of state law meant to be preempted under § 514(a) of ERISA. *See Associated Builders*, 769 F. Supp. at 1548.

The defendants in both actions have requested that, if we find that the Act is preempted by ERISA, which we have, we treat the portion of the Act concerning fringe benefits as severable from the rest of the section in which it is contained. While the Prevailing Wage Act does not contain a separate severability provision, Pennsylvania's general severability statute, 1 Pa.

Cons. Stat. Ann. § 1925, does encompass the Act. That statute provides that:

> If any provision of any statute . . . is held invalid, the remainder of the statute . . . shall not be affected thereby, unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend on, the void provision . . . that it cannot be presumed that the General Assembly would have enacted the remaining valid provisions without the void one; or unless the court finds that the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

From this statute it is evident "that there is a clearly expressed legislative preference to retain the viability of the legal portions of a statute, if reasonably possible." *Planned Parenthood v. Casey*, 978 F.2d 74, 77 (3d Cir. 1992). The governing principles on severability were set out by the Pennsylvania Supreme Court in *Saulsbury v. Bethlehem Steel Co.*, 413 Pa. 316, 196 A.2d 664 (1964):

> [A] statute or ordinance may be partially valid and partially invalid, and . . . if the provisions are distinct and not so interwoven as to be inseparable . . . courts should sustain the valid portions.

Id. at 666; *see also Planned Parenthood*, 978 F.2d at 77.

We do not believe that the portion of the Prevailing Wage Act that calls for the inclusion of benefits in the prevailing wage determination is severable from the rest of the Act. Under the Act, the prevailing rate is made up of an hourly wage rate and an hourly benefit rate. The portion of the rate based on benefits is interwoven into the Act. A prevailing rate without any allowance for benefits would be much different from the present system. We believe the legislature intended to include a benefit computation in the prevailing rate, and to enforce the Act without such a computation would be contrary to this legislative intent.

IV. *Conclusion*

Although we have no doubt that the Pennsylvania Prevailing Wage Act was enacted by the state legislature for admirable purposes, and has been implemented to achieve these purposes, we cannot escape the conclusion that the Act, its accompanying regulations and the Declaratory Order of the Prevailing Wage Appeals Board dated April 13, 1992, are preempted by ERISA. Therefore, we will grant the motions for summary judgment filed by plaintiffs Keystone Chapter in Civil Number 92-0459 and Bell and Communication Workers in 92-1105. The defendants' motions in both actions will be denied. Accordingly, the Pennsylvania Prevailing Wage Act, its accompanying regulations, and the Declaratory Order of the Prevailing Wage Appeals Board dated April 13, 1992 are hereby declared to be invalid and unenforceable because they are preempted by the Employee Retirement Income Security Act. Our grant of summary judgment on Count II of the complaint filed in 92-1105 will effectively close that case. While summary judgment will only be granted with respect to Count I in 92-0495, we believe that Keystone Chapter can be afforded no further relief in the remaining counts of its complaint. We will therefore direct that that case also be closed. Appropriate Orders for each action are attached.

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL NO. 92-0459
(Judge Kosik)

KEYSTONE CHAPTER, ASSOCIATED BUILDERS AND CONTRACTORS, INC., IN REPRESENTATION OF ITS MEMBERS

Plaintiff

v.

THOMAS P. FOLEY, in his official capacity as the SECRETARY OF LABOR AND INDUSTRY FOR THE COMMONWEALTH OF PENNSYLVANIA,

Defendant

ORDER

AND NOW, this 30th day of July, 1993, IT IS HEREBY ORDERED THAT:

[1] the defendant's motion for partial summary judgment [Document 36] is denied;

[2] the plaintiff's motion for summary judgment [Document 37] is granted;

[3] judgment is entered in favor of the plaintiff, Keystone Chapter, Associated Builders and Contractors, Inc., and against the defendant Thomas P. Foley, in his official capacity;

[4] the Pennsylvania Prevailing Wage Act, 43 Pa. Stat. Ann. §§ 165-1 *et seq.*, its accompanying regulations published at 34 Pa. Code 9.101 *et seq.*, and the "Declaratory Order" of the Prevailing Wage Appeals Board dated April 13, 1992 are hereby declared to be invalid and unenforceable because they are preempted by the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.*; and

[5] the Clerk of Court is directed to close this case.

s/ Edwin M. Kosik
Edwin M. Kosik
United States District Judge

②

Supreme Court, U.S.
FILED
FEB 16 1995
OFFICE OF THE CLERK

No. 94-1237

In The

Supreme Court of the United States

◆

October Term, 1994

KEYSTONE CHAPTER, ASSOCIATED BUILDERS AND CONTRACTORS, INC., IN REPRESENTATION OF ITS MEMBERS,

Petitioners,

vs.

SECRETARY OF LABOR & INDUSTRY FOR THE COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION OF THE ROOFING CONTRACTORS ASSOCIATION INDUSTRY FUND, ET AL. FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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DESCRIPTION OF INTEREST OF AMICUS CURIAE

Amici are various contractor associations ("the Associations") which represent the interests of contractors who perform or seek to perform work on construction projects covered by Pennsylvania's Prevailing Wage Act, 43 P.S. § 165-1 *et seq*. (Purdon's 1992). The Associations represent their members' interests on a wide range of issues, including labor relations, industry relations, government affairs, and market developments. The contractors herein represented have entered into collective bargaining agreements with various unions which represent employees of the contractors. The collective bargaining agreements establish certain wage rates and benefit rates that the contractors must pay to or on behalf of their unionized employees.

In filing an amicus curiae brief, the Associations are acting to inform this Court not only of the soundness of the court of appeals' judgment that Congress did not intend ERISA to preempt the Prevailing Wage Act but also of the benefits of the Act and the harm which will result to workers on covered projects and to amici's members if the decision of the court below is reversed.

The Prevailing Wage Act provides for minimum wage rates and benefit rates that contractors must pay to their employees on public works projects. The goal of the Act is to ensure that workers on the covered projects are fairly compensated. Such protection is necessary because Pennsylvania law requires that contracts for such work be awarded in open bidding to the lowest responsible bidder. In the absence of the Prevailing Wage Act, the non-unionized contractors would be permitted to pay their employees substandard wages and benefits on covered projects.

In addition, nonunion contractors would be permitted to utilize substandard wage and benefit rates when calculating their bids, effectively excluding unionized contractors from competition on those projects. Because of the many apprenticeship programs operated by unionized contractors in conjunction with the trade unions, these contractors as a rule employ the most highly skilled individuals in their respective trades. Thus, exclusion of unionized contractors from bidding on these projects would deprive the Commonwealth and its citizens of the benefits of that highly skilled workforce. The law represents a fair and reasonable method of equalizing the labor costs for all employers who bid on covered projects, without regard to their union affiliations.

Amici believe that they bring a unique perspective to the Court in representing the interests of contractors who are bound by the mutually beneficial collective bargaining process to pay certain minimum compensation rates to their employees. This perspective permits amici to offer certain insights and policy considerations that will be helpful to this Court in its review of the Petition for a Writ of Certiorari.

CONSENT OF THE PARTIES

Petitioner, Keystone Chapter, Associated Builders and Contractors, Inc. ("Keystone ABC") and respondent Thomas P. Foley, the Secretary of Labor and Industry for the Commonwealth of Pennsylvania ("Secretary") have consented to the filing of this brief. Communication Workers of America, AFL-CIO, District 13 ("CWA") and Bell Telephone Company of Pennsylvania, ("Bell"), appellees in the court below, also have consented to the filing of this brief. Such consents will be filed concurrently with this brief.

STATEMENT OF THE CASE

The Associations adopt the Statement of the Case set forth in respondent Secretary's Brief in Opposition to the Petition for Writ of Certiorari, as supplemented by the discussion below.

Pennsylvania's Prevailing Wage Act, 43 P.S. § 165-1 *et seq.* (Purdon's 1992), requires the Commonwealth and its political subdivisions to include in every contract for construction, reconstruction, demolition, alteration and/or repair a specification that workmen on those projects shall be paid the prevailing minimum wage rate. 43 P.S. § 165-4. In determining the amount of the prevailing wage applicable to a given project, the Secretary is required to consider not only the prevailing cash wage rate but also the amount contributed for employee benefits pursuant to a bona fide collective bargaining agreement. 43 P.S. § 165-7. The law does not apply to any other public or private construction projects within the Commonwealth.

In April, 1992, Keystone ABC brought suit alleging that the Secretary's *administration* of the Prevailing Wage Act is preempted by the Employee Retirement Income Security Act, 29 U.S.C. § 1101 *et seq.* ("ERISA"). Keystone ABC's amended complaint alleged that the manner in which the Secretary considered contributions toward fringe benefits in determining and enforcing the Prevailing Wage Act "relates to" employee benefit plans as defined in ERISA and therefore is superseded by § 514(a) of ERISA, 29 U.S.C. § 1144(a). Keystone ABC did not challenge the constitutionality of the Prevailing Wage Act or its implementing regulations at 34 Pa. Code § 9.101 *et seq.*

In August, 1992, Bell and CWA filed a similar complaint, alleging that the manner in which the Secretary considered contributions toward fringe benefits in determining and enforcing the Prevailing Wage Act "relates to" employee benefit plans as defined in ERISA and therefore is superseded by § 514. In addition, Bell and CWA complained that because the Prevailing Wage Act requires consideration of employer and employee contributions for employee benefits in determining the minimum wage rate, the entire prevailing wage scheme established by the Prevailing Wage Act relates to and is preempted by ERISA.

On July 30, 1993, Judge Edwin M. Kosik granted motions for summary judgment filed by the plaintiffs in both actions. In so doing, the court not only struck down the method used by the Secretary to enforce the Act but also concluded that the Act, its accompanying regulations, and the Declaratory Order of the prevailing Wage Appeals Board dated April 13, 1992 were preempted by ERISA. *Keystone Chapter, Associated Builders & Contractors, Inc. v. Foley,* Civ. No. 92-0459; *Bell Telephone Co. v. Foley,* Civ. No. 92-1105 (E.D. Pa. July 30, 1993).

The court below reversed the district court's invalidation of the Act and its implementing regulations, concluding that they do no more than "establish a system of wage regulation [for Commonwealth construction projects] that neither burdens nor influences the benefits or structure of employee benefit plans, nor do they interfere with the uniform administration of such plans." (Pet. App. C, 44a-45a). However, the court below affirmed the district court's invalidation of the Declaratory Order solely because it established a presumption that contributions to ERISA benefit plans are bona fide (Pet. App. C, 25a).

REASONS FOR DENYING THE WRIT

The question presented by Keystone ABC's petition is whether Congress, in its effort to reserve to the federal government exclusive regulation of employee benefit plans through ERISA's preemption provision, intended to preclude state and local governments from specifying the minimum compensation that workers on their construction projects are to be paid. Petitioner contends that the court below erroneously answered that question in the negative and that its decision is in conflict with this Court's many decisions concerning the intended sweep of ERISA § 514(a) and with the decision of the United States Court of Appeals for the Second Circuit in *General Electric Company v. New York State*, 891 F.2d 25 (2d Cir. 1989).

As discussed below, this case does not present any justification for the exercise of this Court's certiorari jurisdiction because the decision and opinion of the court below do not conflict with Supreme Court precedent concerning ERISA preemption and implicitly agree with much of the Second Circuit's reasoning in *General Electric*. Moreover, as discussed in the last section of this brief, the Associations believe that the petition should be denied because there is an additional, more compelling ground for affirming the judgment of the court below. Specifically, ERISA represents an exercise of Congress' legislative authority under the Commerce Clause. As such, ERISA was not intended to and constitutionally cannot preempt the Commonwealth of Pennsylvania from engaging in the proprietary act of establishing wage and benefit standards to be paid by its contractors to workers employed on its construction projects.

I.

ASSUMING ARGUENDO THAT ERISA § 514 APPLIES TO THE ACT AND ITS REGULATIONS, PETITIONER HAS NOT DEMONSTRATED ANY ERROR IN THE DECISION OF THE COURT BELOW NOR ANY CONFLICT AMONG THE CIRCUITS.

Whether § 514 preempts the Pennsylvania Prevailing Wage Act, its implementing regulations, or the April 13, 1992, Declaratory Order of the Prevailing Wage Appeals Board ultimately is a question of Congressional intent. *Metropolitan Life Insurance Company v. Massachusetts,* 471 U.S. 721, 747 (1985). This Court repeatedly has cited the comments of Representative Dent and Senator Williams (the House and Senate sponsors of ERISA) as the best evidence of the intended sweep of § 514. *Shaw v. Delta Airlines, Inc.,* 463 U.S. 85 (1983); *Fort Halifax Packing Co. v. Coyne,* 107 S. Ct. 2211, 2216 (1987). Both legislators noted that Congress' purpose in enacting § 514 was to preempt the field for federal regulation, "thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans." *Fort Halifax,* 107 S. Ct. at 2216.

With these comments in mind, Justice Brennan observed in *Fort Halifax:* "We have not hesitated to enforce ERISA's preemption provision where state law created the prospect that an employer's administrative scheme would be subject to conflicting requirements." 107 S. Ct. at 2216. Justice Brennan emphasized that the aim of § 514 is to ensure that employee benefit plans covered by ERISA will be governed by only a single set of regulations, thereby avoiding "a patchwork scheme of regulation [which] would introduce considerable inefficiencies in benefit program operation [and] which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them." 107 S. Ct. at 2217.

In resolving the question of whether Congress intended that ERISA preempt Pennsylvania's Prevailing Wage Law, it is important to recognize that the sole and exclusive goal of the Prevailing Wage Act is "to protect the workmen employed on a government project from payment of substandard wages, keeping in mind that the lowest responsible bidder is customarily awarded public contracts." *Keystone Chapter of Associated Builders & Contractors, Inc. v. Pennsylvania Department of Labor & Industry,* 414 A.2d 1129, 1133 (Pa. Cmwlth. 1980). As the Commonwealth Court noted in *Keystone ABC*, "by guaranteeing such protection, the legislation helps to assure the employment of skilled craftsman on the job .... The Act's purpose is not to preserve jobs for local craftsmen, but to assure the local craftsmen who are employed standard wages ...." *Id. See also Kulzer Roofing, Inc. v. Pennsylvania Department of Labor & Industry*, 450 A.2d 259, 261 (Pa. Cmwlth. 1982).

In order to accomplish that goal, the Prevailing Wage Act requires the Secretary of Labor to determine the general prevailing minimum wage in a locality by reference not only to the actual wages paid for such work, but also to the employer and employee contributions for employee benefits paid pursuant to a bona fide collective bargaining agreement. Section 9.105 of the regulations implements this statutory requirement by providing that for purposes of making a determination of the general prevailing minimum wage rates in a locality, the Secretary may ascertain and consider the wage rates and employee benefits established by collective bargaining agreements. 34 Pa. Code § 9.105(a). That section also requires the Secretary to consider statements by contractors and subcontractors, whether unionized or not, showing wage rates paid on projects within the locality, 34 Pa. Code. § 9.105(c)(3), and any other information pertinent to the determination of prevailing minimum wage rates. 34 Pa. Code § 9.105(c)(4). Finally, § 9.105(d) requires the Secretary to conduct a continuing program to obtain wage rate information, including information relating to contributions for fringe benefits, from contractors, contractors' associations, labor organizations, public officials, and other interested parties. 34 Pa. Code § 9.105(d).

In a previous challenge to the Commonwealth's right to impose a prevailing wage requirement on contractors with whom it does business, petitioner Keystone ABC complained that the Act's requirement that fringe benefit contributions specified in collective bargaining agreements be considered in setting the prevailing wage rate denied the ABC's nonunion members equal protection of the laws because they did not have such agreements. *Keystone ABC v. Pennsylvania Department of Labor & Industry, supra*. In rejecting the ABC's challenge, the Commonwealth Court explained that §§ 9.105(c)(3) and (d) of the regulations do not require the Secretary to include the fringe benefit contributions specified in collective bargaining agreements in the prevailing rate if the collected data shows nonunion construction to be the dominating segment of the industry. In that instance, only the contributions for fringe benefits paid by the nonunion contractors, if any, would be included in the prevailing rate. If no such benefits were provided, fringe benefits would have no effect on the prevailing rate. 414 A.2d at 1133. The court emphasized, however, that if union contractors perform the majority of the construction work in the county, collective bargaining agreements certainly should determine the prevailing wage rates. According to the court, "it is a proper legislative prerogative to mandate that fringe benefits included in a bargaining agreement should be considered as part of the total wage package paid the union employees because such benefits are considered a part of the wage package in the marketplace." 414 A.2d at 1133.

The April 13, 1992, Declaratory Order of the Prevailing Wage Appeals Board also stressed that, given the cost and importance of fringe benefits in today's world, a prevailing rate which includes hourly wage rates and if prevailing, bona fide contributions for fringe benefits, is the only way of ensuring that the compensation paid to workers on its projects is not substandard.

As noted above, the Associations contended in the court below that the Act, the implementing regulations and the Declaratory Order were not subject to ERISA preemption analysis because they represent proprietary rather than regulatory acts of the Commonwealth.[1] However, assuming *arguendo* that ERISA § 514 applies to those laws, the court below was correct in concluding that those requirements should not be preempted. As the court noted, they do not bear any direct relationship to employee benefit plans in that they are not intended to nor do they regulate the affairs of employee benefit plans operating within the Commonwealth; they do not exempt such plans from any particular state action; and they do not otherwise single out employee benefit plans for special treatment (Pet. App. C, 28a-29a).

The court below also correctly noted that although the Act contains a reference to ERISA plans, it does not require the existence of employee benefit plans in order to be effective. Again assuming that the Act is subject to ERISA § 514, the court below properly relied upon this Court's decision in *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825 (1988) in concluding that the Act would conflict with ERISA if it counted all remuneration to workers *except* benefits from ERISA plans in calculating the prevailing rate (Pet. App. C, 29a-30a). Thus, contrary to petitioner's contention, the opinion of the court below in no way conflicts with this Court's many decisions concerning the scope of ERISA § 514.

The petitioner also is incorrect in suggesting that the decision of the court below conflicts with the decision of the Second Circuit in *General Electric Company v. New York State,*

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[1] The court rejected that argument, concluding that the Commonwealth was acting "with an interest in setting policy", not as a proprietor and that the law was intended to "establish labor standards" under its "traditional police power" (Pet. App. C, 27a, n.14). In so concluding the court below failed to recognize that this "policy-setting" conduct was limited to the Commonwealth's own projects.

supra. Quite to the contrary, the court below implicitly agreed with the Second Circuit's analysis when it concluded that the Secretary's previous "line item" approach to enforcement would be preempted by ERISA (Pet. App. C, 39a). In the view of the court below, so long as "line item" compliance with the benefits component is not required, the law does not require or encourage an employer to provide certain benefits, to alter the manner in which it provides benefits, or even to provide benefits at all. *Id.* p. 37a. On that basis, the court properly distinguished its decision from the *General Electric* decision and from decisions of the Ninth and Tenth circuits in *Local Union 598 v. J.A. Jones Constr. Co.*, 846 F.2d 1213 (9th Cir.), *aff'd*, 488 U.S. 881 (1988), and *National Elevator Indus., Inc. v. Calhoun*, 957 F.2d 1555 (10th Cir.), *cert. denied*, 113 S. Ct. 406 (1992), respectively.[2] Thus, in no way can it be said that the decision of the court below is in substantial conflict with decisions of other courts of appeals.

As the opinion of the court below makes clear, the complaint of Keystone ABC employers in this case really does not concern regulation of their employee benefit plans at all. Rather, they object to the prevailing wage requirements because the requirements can have the effect of requiring contractors who choose to do business on Commonwealth projects to pay their employees additional wages.[3] This is true because the law does not require that any sort of fringe benefits be provided. Indeed, so long as the wage rate specified is greater than the rate which the petitioner's members pay their employees, the law would have the same effect (albeit to a lesser degree) even if the law did not permit consideration of fringe benefits.

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[2] The court below also properly noted that the Second Circuit's objection to the administrative burden placed upon employers attempting to comply with the benefits portion of the law appeared to stem from the fact that the New York law required "line item" compliance with the benefits specification (Pet. App.C, 40a-41a, n.22).

[3] Of course, if the Secretary determines that in a given locale their compensation package prevails, the law will have no effect on their employee compensation costs.

The following example illustrates the above proposition. Assume that the members of the Keystone ABC compensate their workers at the rate of $10.00 per hour in wages and $5.00 in fringe benefit contributions. Assume further that, for a given project, the Secretary determines that the wage rate prevailing in the locale for such work (without regard to fringe benefit contributions) is $13.00 per hour. In such a case, the ABC members would have the same complaint regarding the law even though fringe benefits are not considered; namely, that they will be forced to eliminate their fringe benefit packages and pay their workers more in wages in order to remain competitive. Indeed, it is quite likely that in such a situation, the ABC members would claim that the state must allow them to credit their fringe benefit costs towards satisfaction of the wage requirement in order to avoid the adverse effect of the law on their employee benefit plans. Of course, by so doing, they would invite the very sort of fringe benefit record-keeping against which they now protest.

Precisely because in today's world fringe benefits constitute a valuable component of employment compensation, the specification of any wage rate, with or without regard to fringe benefits, will create the same problem for a contractor who pays his employees less than the specified wage because in all likelihood he does provide those employees with fringe benefits. Of course, as noted by the court below, any contractor who desires to avoid the impact of those requirements can do so simply by choosing not to bid on the Commonwealth's projects (Pet. App. C, 39a, n.19).

In summary, Pennsylvania's prevailing wage requirements are nothing more than a mechanism employed by the Commonwealth to ensure that workers on its projects are fairly compensated. This mechanism is especially important given the fact that Pennsylvania law requires the Commonwealth to award its construction contracts to the lowest responsible bidder. The Prevailing Wage Act's requirement that the cost of fringe benefits be considered in determining what rate of compensation is fair represents an acknowledgment by the Commonwealth that fringe benefits generally are a valuable part of an employee's compensation. The fact that some employers who choose to work on the Commonwealth's construction projects may have to pay their workers more in wages because of the particular make-up of their fringe benefit packages does not represent the kind of "relationship" to employee benefit plans that Congress intended to prohibit when it enacted ERISA. As the court below properly noted, "ERISA's preemption clause aims 'to ensure benefit plans will be governed only by a single set of regulations,' *FMC Corp. v. Holliday,* 498 U.S. 52, 60 (1990), not to bestow upon employers a uniform regulatory and economic environment for all their activities across the country." (Pet. App. C, 35a-36a).

II.

AS COMMERCE CLAUSE LEGISLATION, ERISA WAS NOT INTENDED TO AND CONSTITUTIONALLY CANNOT PREEMPT THE COMMONWEALTH OF PENNSYLVANIA FROM ESTABLISHING WAGE AND BENEFIT STANDARDS TO BE PAID BY ITS CONTRACTORS TO WORKERS EMPLOYED ON ITS CONSTRUCTION PROJECTS.

Even if the Court were to grant certiorari, the Associations submit that the Court would not reach the issue raised by petitioner. Rather, as discussed below, it would conclude that the Act and its implementing regulations are not preempted by ERISA because they represent proprietary rather than regulatory acts of the Commonwealth.

It is clear from the above description of the law and its purpose that the Commonwealth's prevailing wage requirements are not intended to nor do they in fact "regulate" within the field of employee benefits because they are limited in application to employers who choose to work on the Commonwealth's construction projects. As this Court recognized in *United Building and Construction Trades Council of Camden County v. City of Camden*, 465 U.S. 208 (1984), this distinction between the state acting as a regulator and the state acting as a proprietor is critical for purposes of Commerce Clause preemption analysis. There the Court noted: "The Commerce Clause acts as an implied restraint upon state regulatory powers. . . . When the State acts solely as a market participant, no conflict between state regulation and federal regulatory authority can arise." 465 U.S. at 220. *Camden County* involved a challenge to resident hiring requirements applicable only to Camden County projects. Because of the above limitation on Congress' power under the Commerce Clause, the Court concluded: "Camden may, without fear of violating the Commerce Clause, pressure private employers engaged in public works projects funded in whole or in part by the city to hire city residents." 104 S. Ct. at 1029.

The Court reiterated this distinction recently in *Building & Construction Trades Council v. Associated Builders & Contractors*, 113 S. Ct. 1190 (March 8, 1993). In that case, the Massachusetts Chapter of the Associated Builders and Contractors challenged the Massachusetts Water Resources Authority's right to impose a project labor agreement on the Boston Harbor clean-up project on the grounds of ERISA and National Labor Relations Act preemption. The trial court rejected the ABC's ERISA challenge, concluding that ERISA was not intended to prohibit a state or local authority from requiring contractors to participate in identified employee benefit plans on one of their projects. *See Associated Builders & Contractors v. MWRA*, 935 F.2d 345 (1st Cir. 1991). The ABC persisted in its claim that the NLRA preempted the contractual requirement, however, arguing that the requirement constituted state regulation of an area that Congress intended to be left for determination by the free play of the economic forces of management and labor.

This Court acknowledged that the Massachusetts Water Resource Authority's requirement constituted direct interference within this protected area of labor-management relations insofar as any persons seeking to do business on the project were concerned. Nonetheless, the Court concluded that the State's action was not preempted because it constituted proprietary acts of the state rather than regulation within a protected zone. 113 S. Ct. at 1196.

The Court went on to hold that so long as the State's procurement activities are not used for regulatory purposes, the State should be free to impose the same requirements on its contractors that a private purchaser lawfully may impose. 113 S. Ct. at 1198. Importantly, the Court noted that even though such requirements may force government contractors to alter their mode of operation, those contractors can avoid the impact of such requirements by choosing not to do business with the State. 113 S. Ct. at 1198.

Building & Construction Trades Council v. ABC concerned a single project specification. However, on June 9, 1993, the Ninth Circuit Court of Appeals did not hesitate in applying that analysis to a section of Oregon's Prevailing Wage statute which, like Pennsylvania's, applied only to state and local public works projects. *Babler Brothers, Inc. v. Roberts,* 995 F.2d 911 (9th Cir. June 9, 1993). In that case, the appellants contended that the statute interfered with collective bargaining relationships because it did not establish an across the board minimum standard applicable to all employers and that enforcing the statute in today's world had the effect of making it more difficult for non-union contractors to bid on public jobs. According to the appellants, the statute interfered with collective bargaining relationships by weighing in on the side of the union as opposed to nonunion contractors on public jobs. 995 F.2d at 915-16.

The Ninth Circuit rejected appellants' preemption claim, explaining:

> We believe that these concerns are adequately addressed by the Supreme Court's recent decision in *Associated Builders.* As in *Associated Builders,* the State here has not endeavored to *regulate* the bargaining relationship of employers and employees. Rather, the State is enforcing prescribed working conditions on public projects in which the State and local jurisdictions have a proprietary interest. In *Associated Builders,* Massachusetts restricted bidding to union contractors and subcontractors and the Court held the restriction was not pre-empted. The obstacle to non-union bidding under the Oregon statute cannot possibly be as great as the obstacle imposed in Massachusetts by the requirement that all contractors on the job be signatory to a collective bargaining agreement. Accordingly, we conclude that the Oregon statute is not pre-empted by federal labor law. Any remedy for the appellants is to be found in the legislature and not in the federal courts.

995 F.2d at 916 (emphasis added). The Ninth Circuit recently reaffirmed the *Babler* analysis in *McCullom v. Roberts,* 17 F.3d 1219, 1223 (9th Cir. 1994).[4]

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[4] In *Lott Constructors, Inc. v. Camden County Board of Chosen Freeholders,* 1994 WL 263851 (D. N.J. 1994), the U.S. District Court for the

(Cont'd)

Pennsylvania's prevailing wage requirements similarly do not constitute regulation within the zone protected by § 514 of ERISA. Rather, the requirements have the sole purpose and effect of ensuring that workers on the Commonwealth's projects are fairly compensated. Although they are codified requirements, they do nothing more than establish uniform contract requirements for the Commonwealth's construction projects. Admittedly, contractors who have wage and benefit costs which do not match the wage and benefit specifications on a given project will have to alter the wage component or benefit component of their compensation package if they desire to participate on the project. However, as the Supreme Court noted in *Building & Construction Trades Council v. ABC,* any contractor can avoid the impact of those requirements by choosing not to do business on the Commonwealth's construction projects.

Viewed in this light, Pennsylvania's prevailing wage requirements clearly are not the type of state action with which Congress was concerned when it enacted ERISA. Just as Congress did not intend to prohibit the Commonwealth from establishing wage and benefit standards for its own workers, so also it did not intend nor constitutionally could it have intended to prohibit the Commonwealth from establishing wage and benefit standards applicable to workers employed on its projects by independent contractors. *BCTC of Camden County,* 104 S. Ct. 1028 ("for purposes of the Commerce Clause everyone employed on a city public works project is . . . 'working for the City' "); *see also Lott Constructors, Inc. v. Camden County Board of Chosen Freeholders, supra.*

(Cont'd)

District of New Jersey extended this distinction to ERISA preemption, upholding a Camden County resolution that workmen employed on all of its projects be paid specified wages and benefits in accordance with a specified project labor agreement. *Id.* at *18.

CONCLUSION

For all of the above reasons, this Court should deny the petition.

Respectfully submitted,

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FEB 15 1995

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No. 94-1237

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

KEYSTONE CHAPTER, ASSOCIATED BUILDERS AND CONTRACTORS, INC., IN REPRESENTATION OF ITS MEMBERS,
Petitioner,

v.

SECRETARY OF LABOR & INDUSTRY FOR THE COMMONWEALTH OF PENNSYLVANIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF AMICUS CURIAE BY STEAMFITTERS LOCAL UNION NO. 420, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE-FITTING INDUSTRY, FOR THE RESPONDENT

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Petitioner,

vs.

SECRETARY OF LABOR & INDUSTRY FOR THE COMMONWEALTH OF PENNSYLVANIA,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

Steamfitters Local Union No. 420, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the respondent has been obtained. The consent of the attorney for the petitioner was requested but not received.

The interest of Steamfitters Local Union No. 420 in this case arises from the fact that its members have a substantial interest in obtaining and retaining employment on public works projects that are covered by the Pennsylvania Prevailing Wage Act, 43 P.S. §§165-1, *et seq.*. A reversal of the decision of the Court below will automatically affect existing collective bargaining agreements to which the Union is a party and the collective bargaining relationship between the Union and all employees performing work on public projects.

Respectfully submitted,

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Re: Keystone Chapter ABC v. Secretary of Labor and Industry

Dear Mr. Sigmond:

As we discussed over the telephone, respondent consents to the filing of an amicus brief on behalf of the Steamfitters Local Union No. 420, opposing the petition for a writ of certiorari in this matter.

Very truly yours,

Susan J. Forney

SUSAN J. FORNEY
Senior Deputy Attorney General

SJF: dap

cc Elaine Mead

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STATEMENT OF INTERESTS OF *AMICUS CURIAE*

Steamfitters Local Union No. 420, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry ("Local 420" or "Union") is a labor organization that represents more than 3500 skilled steamfitters, pipefitters and welders in Southeastern Pennsylvania. The Union represents employees who perform steamfitting, pipefitting and welding work on a wide variety of private and public construction projects as well as numerous skilled classifications in the heating, ventilation and air conditioning service industry. Its membership includes apprentices and tradespersons who, through job experience and classroom instruction, have obtained journeymen status. Local 420 is signatory to a number of collective bargaining agreements with employers in the construction industry. The collective bargaining agreements establish wages and other terms and conditions of employment, including contributions to employee benefit funds regulated by ERISA, for work performed in the private sector as well as on public works projects.

Members of Local 420 have substantial interest in obtaining and retaining employment on public works projects that the State and local governments typically award to the lowest responsible bidder.[1] Local 420 members have worked in the past, are presently working, and desire to work in the future on public works construction projects that are covered by the Act. In upholding the Act, the Third Circuit Court of Appeals' decision directly effects the wages of Local 420 members who are currently employed on public works projects. The earnings of Local 420 members on future contracts are similarly affected in a beneficial manner, as the wage and benefit rates in the collective bargaining agreements to which Local 420 is a party closely parallel the rates determined by the Secretary of Labor and Industry for public works projects.

For members of Local 420 and other similarly-situated tradespersons, the decision of the Court of Appeals results in work opportunities and stable wages and fringe benefits on public works projects. Employers who are bound by collective bargaining agreements are placed on a competitive footing in bidding on public contracts vis-a-vis employers who offer fewer or no fringe benefits to their employees. If the Act were to be overturned, employers who offer no benefits will have a decided advantage as public works contracts are typically awarded to the lowest responsible bidder. *United States v. Binghampton Const. Co.,* 347 U.S. 171 (1954).

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[1] The cost of labor on public works projects is an integral part of the competitive bid submitted by a prospective contractor.

SUMMARY OF ARGUMENT

The Pennsylvania Prevailing Wage Act ("Act") is a valid exercise of state power in the area of health and welfare and is not preempted by ERISA. In upholding the Act, the Third Circuit decision, *Keystone Chapter, Assoc. Builders and Contractors, Inc. v. Foley,* 37 F.3d 945 (3rd Cir. 1994) (*"Keystone"*), follows Supreme Court precedent and is consistent with other Circuit decisions.

The Act does not relate to any benefit plan covered by ERISA, and, therefore, does not fall under ERISA's preemption standard. The Act directs the Secretary of Labor and Industry to set minimum prevailing wages, including a cash component and a benefit component. The benefit component can be satisfied by contributions to employee benefits or additional cash wages. Therefore, the Act does not place any restrictions or requirements on ERISA benefits, but rather, only demands that certain wages be paid. In sum, the Act can be fulfilled without any reference to ERISA-covered benefit plans and neither directly or indirectly regulates conduct towards ERISA plans.

ERISA's preemption clause was not intended to prevent states from regulating in the area of wages or employee compensation generally. Although state wage regulation, such as the Act, may affect employer decisions regarding ERISA-covered benefit plans, both this Court and lower federal courts have recognized that this type of affect falls well outside the parameters of ERISA preemption. Thus, as a legitimate exercise of state regulation, the Act is not preempted by ERISA and the "Petition for a Writ of Certiorari" should not be granted.

ARGUMENT

I. THE PENNSYLVANIA PREVAILING WAGE ACT IS A VALID EXERCISE OF HEALTH AND SAFETY REGULATION AND IS NOT PREEMPTED BY ERISA.

The purpose of the Act is to "protect workmen from substandard pay by ensuring that they receive the prevailing minimum wage." *Kulzer Roofing v. Com. Dept. of Labor and Industry,* 459 A.2d 259, 261 (Pa. Cmwlth. Ct. 1982), *citing, Pennsylvania Prevailing Wage Appeals Bd. v. Steve Black, Inc.,* 27 Pa. Cmwlth. Ct. 21, 365 A.2d 685 (1976). In making a determination of the prevailing minimum wage, the "employer and employe contributions for employe benefits pursuant to a bona fide collective bargaining agreement shall be considered an integral part of the wage rate." 43 P.S.A. § 165-7. To accomplish this, the Act requires the Secretary set a prevailing wage that consists of a cash component and may include a benefits component.

This Court has recognized that Congress never intended ERISA to infringe on traditional areas of state control such as health and welfare. The state regulation of wages is one of those "areas of traditional state regulation that . . . Congress did not intend to preempt." *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 740 (1985). Similarly, the establishment of minimum labor standards is a traditional police power generally left to the states. *Fort Halifax Packing Co, Inc. v. Coyne,* 482 U.S. 1, 21 (1987).

II. THE THIRD CIRCUIT'S DECISION UPHOLDING THE PENNSYLVANIA PREVAILING WAGE ACT FOLLOWS SUPREME COURT PRECEDENT

The Third Circuit's decision upholding the Act conforms with the rulings of the Supreme Court. ERISA's preemption section — § 514(a) — promotes uniform regulations of employee benefits plans by preempting "any and all State law insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1114(a) (emphasis added). This Court has interpreted "relate to" to mean having a "connection with", or "reference to", ERISA-covered plans, and the Court has cautioned that some state actions may affect employee benefit plans in "too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97, 100 n.21 (1983). *See also, District of Columbia v. Greater Washington Bd. of Trade,* ___ U.S. ___, 113 S.Ct. 580, 583 n.1 (1992). The Act has just such a "remote" and "peripheral" relationship to ERISA.

The Petitioner concedes that the Act and regulations do not bear any direct relationship to ERISA plans. The Act does not "single out" ERISA plans for special treatment or even refer to such plans. *United Wire, Etc. v. Morristown Memorial Hosp.*, 995 F.2d 1179, 1192 (3d Cir. 1993), *cert. denied,* 114 S.Ct. 382, 126, L.Ed.2d 332 (1993). Rather, the Petitioner incorrectly argues that the Act is preempted by virtue of its indirect relation to ERISA. Although a state law's indirect relation to ERISA can be grounds for preemption, the Act bears no such relationship.

The Act's relationship to ERISA is most analogous to the New York disability benefits law upheld by this Court in *Shaw, supra.* Although disability benefits are exempt from ERISA, the New York law allowed employers to include these benefit obligations in multibenefit ERISA plans which were subject to ERISA preemption. Even so, this Court held that the New York law was not preempted because, even though the State was prohibited from forcing an employer to alter its ERISA plan, it could "force the employer to choose between providing disability benefits in a separately administered plan and including the state-mandated benefits in its ERISA plan." *Shaw, supra,* at 108 (emphasis added). Thus, if New York was dissatisfied with the disability benefits included in an employer's ERISA plan, it could avoid ERISA preemption by forcing the employer to maintain a separate disability benefits plan.

The Act, like the New York law, refrains from placing any requirements on ERISA benefits and only requires that an employer fulfill a wage obligation and not a benefits obligation. Just as the New York law can be fulfilled by maintaining a separate disability plan, the Act can be fulfilled using non-

ERISA benefit contributions or cash wages. As the Third Circuit noted, "[l]ike the New York law in *Shaw*, the Prevailing Wage Act is not preempted because an employer may comply without making any adjustment in its ERISA plans." *Keystone*, 37 F.3d at 961. *See also, Mackey v. Lanier Collection Agency & Service Co.*, 486 U.S. 825, 830-841 (1982) (approving garnishment law that would apply to ERISA plan benefits as well as other assets of debtors).

The state statutes and regulations that this Court has found preempted by ERISA are distinguished from the Pennsylvania law in that they directly or indirectly require compliance with ERISA benefits. In *District of Columbia v. Greater Washington Bd. of Trade*, ___ U.S. ___, 113 S.Ct. 580 (1992) (*"Greater Washington"*), a District of Columbia worker compensation law was held preempted by ERISA because it required employers who provided health insurance for their employees to provide equivalent workers' compensation. The District could only determine an employer's workers compensation benefit obligation by reference to that employer's obligations under its ERISA plan. Therefore, the required health insurance was held preempted because it was a welfare benefit plan regulated by ERISA. *Greater Washington, supra*, at 583.

The Act is clearly distinct from the worker compensation law in *Greater Washington* in that it does not regulate a plan covered under ERISA. Whereas the District's law was predicated on the existence of ERISA plans, the Pennsylvania law is only predicated on the existence of a prevailing wage. Under the Act, the Pennsylvania Secretary of Labor and Industry could measure a locality's prevailing benefits contributions even if all of the contributions were non-ERISA benefits. Similarly, a public works contractor could satisfy the benefits component of a given prevailing wage by only making non-ERISA benefit contributions, or by paying the equivalent in cash. As the Third Circuit noted, "[i]n the absence of ERISA plans, the Prevailing Wage Act could be meaningfully applied." *Keystone*, 37 F.3d at 957.

III. THE THIRD CIRCUIT'S DECISION UPHOLDING THE PENNSYLVANIA PREVAILING WAGE ACT IS CONSISTENT WITH OTHER FEDERAL CIRCUIT COURT DECISIONS.

The Third Circuit decision and ERISA preemption analysis conforms with other federal Appellate Court decisions that have found other state laws "too tenuous, remote, or peripheral" to warrant ERISA preemption. A previous Third Circuit decision held that a New Jersey statutory scheme setting minimum hospital rates was not preempted despite its obvious economic impact on ERISA plans because the statute could be "meaningfully applied" in the absence of any ERISA plans. *United Wire, Etc. v. Morristown Memorial Hosp.*, 995 F.2d 1179 (3d Cir. 1993), *cert. denied,* 114 S.Ct. 382, 126 L.Ed. 332 (1993). In *Aetna Life Ins. Co. v. Borges,* 869 F.2d 142, 148 (2d Cir. 1989), *cert. denied,* 493 U.S. 811 (1989), the Second Circuit upheld escheat laws that affected ERISA plans because a law's "indirect impact alone is not sufficient". *See also, Rebaldo v. Cuomo,* 749 F.2d 133, 140 (2d. Cir. 1984), *cert. denied,* 472 U.S. 1008 (1985) (statute regulating hospital rates that affected ERISA plans' ability to negotiate rates held not preempted).

State laws that Circuit Courts have found ERISA preemption can be distinguished from the Act by their far greater affect on ERISA benefits. *Local Union 598 v. J.A. Jones Constr. Co.,* 846 F.2d 1213 (9th Cir. 1988), *aff'd,* 488 U.S. 881 (1988) (state prevailing wage statute requiring contributions to apprenticeship program, an ERISA plan, preempted by ERISA), *aff'd,* 488 U.S. 881 (1988); *Standard Oil Co. of California v. Agsalud,* 633 F.2d 760 (9th Cir. 1980), *aff'd,* 454 U.S. 801 (1981) (Hawaii law requiring comprehensive health benefits for all workers preempted by ERISA); *National Elevator Industry, Inc. v. Calhoun,* 957 F.2d 1555, 1561 (10th Cir. 1992), *cert. denied,* 113 S.Ct. 406, 121 L.Ed.2d 331 (1992) (Oklahoma law reducing the minimum wage for employees only in specified apprenticeship program, which was an ERISA plan, preempted by ERISA); *General Electric Co. v. New York State Dept. of Labor,* 891 F.2d 25 (2d Cir. 1989), *cert. denied,* 496 U.S. 912 (1990) (New York prevailing wage law requiring benefit contributions in particular categories preempted by ERISA). Unlike these laws, the Pennsylvania Act neither favors nor restricts ERISA benefits.

Two lower court decisions have incorrectly interpreted both the ERISA preemption test applied by this Court and the Third Circuit *Keystone* decision. *See Associated Builders & Contractors, Saginaw Valley Area v. Perry,* No. 93-CV-10016-BC, 1994 WL 668241 (E.D.Mich.), 2 WH Cases 2d (BNA) 754 (*"Perry"*); *Associated Builders & Contractors v. Baca,* 769 F.Supp. 1537 (N.D. Cal. 1991)(*"Baca"*). In both cases, the District Courts held that their respective state prevailing wage laws were preempted by ERISA because the laws did not credit fringe benefits paid in excess of the fringe benefit component of the prevailing wage requirement. By limiting the amount of benefits that could be subtracted from the *per diem* wage calculations, these lower courts held that the laws 'related to' and regulated ERISA by discouraging payment of benefits at higher than prevailing levels. *Perry,* 1994 WL 668241, at *4, 2 Wage & Hour Cas. at 758; *Baca,* 769 F.Supp. at 1548. The Petitioner — presenting a similar argument in this — case misinterprets the legal standard necessary for ERISA preemption.

When Petitioner presented this position on appeal to the Third Circuit, that court observed the irony of this argument: the party objects to a state prevailing wage law on the grounds that is does not relate enough to employee benefits and benefit plans. Thus, Petitioner suggests that the level of required cash wages should be tied to the level of benefits, whereas the Act currently fixes a cash wage component independent of a benefits component. As the Third Circuit noted, "[a] state law does not dictate or restrict the choices of ERISA plans by having nothing to do with employee benefits." *Keystone*, 37 F.3d at 959.

In fact, the objection raised by the Petitioner and the Michigan District Court could be raised against a prevailing hourly cash wage law that did not even have any benefits component. "Such a law would create the same "disincentive" against awarding benefits," the Third Circuit stated in *Keystone,* "because employers would have to pay the wage no matter what level of benefits they provided." *Id.* Like the benefits component, the minimum cash wage requirement imposes an additional cost on the Pennsylvania works contractor and could influence its choices regarding ERISA benefits contributions. However, any wage regulation could have this effect and such wage regulation is clearly not preempted by ERISA. *Massachusetts v. Morash,* 490 U.S. 107 (1989) (Massachusetts statute requiring employers to pay employees for all unused vacation time upon discharge not preempted because law was instance of wage regulation and did not relate to benefit plans); *Fort Halifax,* 482 U.S. at 3-4 (Maine statute requiring employers to give severance payment of one week's salary for every year an employee had worked in event of plant closing not preempted).[2]

The Third Circuit's decision in *Keystone* upholds a valid exercise of state wage regulation. In its ruling, the Third Circuit follows Supreme Court precedent and conforms with other Appellate Court decisions. This Court should not grant this Petition given the absence of any real conflict among the lower federal courts.

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[2] Both the Petitioner and the Eastern District Court of Michigan missed this crucial distinction between the Pennsylvania and District of Columbia laws and, based on this misperception, incorrectly accused the Third Circuit of using a discredited two-step ERISA preemption analysis. Perry, 1994 WL 668241, at *5, 2 Wage & Hour Cas. at 757. Greater Washington held that if a state law mandates disability benefits that are covered under ERISA, the law is preempted. Contrary to the Eastern District's opinion, the Third Circuit used the same analysis. However, unlike the District's law, the Act does not mandate any benefits covered under ERISA and therefore, the Act is not preempted. There was no "second step" in the Third Circuit's analysis.

CONCLUSION

The Petition for a Writ of Certiorari should not be granted.

Respectfully submitted,

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NO. 94-1237

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

KEYSTONE CHAPTER,
ASSOCIATED BUILDERS AND CONTRACTORS, INC.,
in representation of its members,
Petitioner,
v.
JOHNNY J. BUTLER,
in his official capacity as
Acting Secretary of Labor and Industry
for the Commonwealth of Pennsylvania,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Pennsylvania's Prevailing Wage Act relates to employee benefit plans in more than a "tenuous, remote and peripheral manner" and therefore is pre-empted by ERISA?

LIST OF PARTIES

The parties listed in the petition for certiorari are accurate except that respondent Thomas P. Foley, Pennsylvania's Secretary of Labor and Industry has been succeeded in that office by Acting Secretary Johnny J. Butler, who should be substituted as respondent. See Sup. Ct. R. 35.3.

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STATEMENT OF THE CASE

Pennsylvania's Prevailing Wage Act, Pa. Stat. Ann., tit. 43, §§165-1 through 165-17 (Purdon's 1992), governs the minimum wages to be paid to workers on public work projects. Petitioner claims that the Act, its regulations and an administrative order implementing it are pre-empted by Section 514(a) of the Employee Retirement Income Security Act, 29 U.S.C. §1141(a) (ERISA).

1. Petitioner is Keystone Chapter, Associated Builders and Contractors, Inc., is a non-profit Pennsylvania corporation whose members are involved in the construction industry. C.A. App. 9, 66.[1] Respondent is Pennsylvania's Secretary of Labor and Industry, who is generally responsible for administering and

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[1] C.A. App. refers to the appendix filed in the Court of Appeals.

enforcing the Act. C.A. App. 9; Pet. App. 13a, 14a.

The purpose of the Act "is to protect workers employed on public projects from substandard wages," Lycoming County Nursing Home v. Pennsylvania, 627 A.2d 238, 242 (Pa. Commw. Ct. 1993), by requiring that they receive at least the "minimum prevailing wages" as determined by the Secretary. Pa. Stat. Ann., tit. 43, §§165-5, 165-7. The Act specifically requires the Secretary, in determining the "minimum prevailing wages" to include "employer and employe contributions for employee benefits," ibid., and it is this provision which has given rise to this case.

In accordance with this provision, the wage rates established by the Secretary contain both a wage component and a benefits component. Pet. App. 14a.

The Act directs the Secretary to determine wage rates by locality and job classification, but neither the Act nor its implementing regulations, 34 Pa. Code §§9.101-9.112, give any further guidance on just how the benefit component of the wage rate is to be computed.[2]

Over the years the Secretary's approach to this issue has varied. Pet. App. 15a. Before 1988 the Secretary focused on the total contributions toward benefits without regard to the specific types of benefits funded or the specific amount contributed to each. App. 15a, n.5. Later the Secretary took a "line-item" approach, requiring employers to contribute to benefits in the type and in the amount the Secretary found to prevail in each locality. Ibid. At all times, however, employers could fulfill their obligation either by making contributions to employee benefits, or by paying their employees the equivalent of those contributions in cash. Pet. App. 14a; 9 Pa. Code §9.106.

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[2] Section 9.102 of the regulations does define contributions for employee benefits as:

> [F]ringe benefits' paid or to be paid, including payment made whether directly or indirectly, to the workmen for sick, disability, death, other than Workmen's Compensation, medical, surgical, hospital, vacation, travel expense, retirement and pension benefits. 34 Pa. Code §9.102.

In 1992, the Prevailing Wage Appeal Board, an administrative board charged with adjudicating grievances arising from the administration of the Act, decided that the line-item approach was no longer appropriate with regard to ERISA plans.

In response to the grievances of the petitioner and others, the Board issued a Declaratory Order requiring the Secretary to give ERISA plans special consideration in determining compliance with the benefits component of the Act. Under the Order, contributions to ERISA plans were to be credited against the benefits component of the wage rate regardless of whether the benefits provided matched the categories the Secretary determined were prevailing. Pet. App. 17a-19a; C.A. App. 70-76.

2. Petitioner then brought this action seeking to have the Prevailing Wage Act, its regulations and the Declaratory Order declared pre-empted by ERISA.[3] On cross-motions for summary judgment the District Court entered summary judgment in favor of Petitioner and declared the Act, its regulations and the Declaratory Order

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[3] Petitioner also raised constitutional claims which were not addressed by either the district court or the Court of Appeals.

invalid and unenforceable. Pet. App. 57a-58a.

The District Court reasoned that the Act could affect employee benefit levels by discouraging employers from paying more than the prevailing rate toward benefits. Pet. App. 54a. The District Court also concluded that as administered the Act required employers to calculate what they paid toward the wages and benefits which imposed ongoing administrative burdens that "fall within the parameters of ERISA plans." App. 53a-54a. Finally, the District Court observed that the Declaratory Order specifically mentioned ERISA plans and therefore, in the District Court's view, "related to" employee benefit plans under the holding of Shaw v.

Delta Air Lines, Inc., 463 U.S. 85, 97 (1983). Pet. App. 53a-54a.[4]

3. The Court of Appeals affirmed the District Court's order with regard to the Declaratory Order, but reversed it with regard to the Act and its regulations. The Court of Appeals agreed that the Declaratory Order was pre-empted because it singled out ERISA plans for special treatment contrary to this Court's teaching in Mackey v. Lanier Collection Agency & Serv., 486 U.S. 825 (1988). Pet. App. 25a-26a.

The Court of Appeals then turned to the Act and its regulations. It held that they were not pre-empted because they could reasonably be interpreted as not requiring payment of benefits as part of the prevailing wage. Pet. App. 27a. Rather, the Court of Appeals concluded under the Act and regulations an employer had the option to pay the prevailing wage entirely in cash; or, to satisfy part of the wage through contributions to benefits of its own choosing. Pet. App. 27a-28a.

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[4] The district court went on to reject the Secretary's argument that the reference to contributions for fringe benefits was severable from the Act. Pet. App. 55a-56a.

Interpreted in this way, the Court of Appeals reasoned that the statutory scheme regulated wages, an area traditionally governed by the States and not benefits. Pet. App. 28a. The Court of Appeals noted neither the Act nor its regulations were designed to affect employee benefit plans. Pet. App. 29a. Nor, did they single out benefit plans for special treatment. Pet. App. 29a.

The Court of Appeals also found that the statutory scheme did not predicate obligations solely upon benefit plans covered by ERISA, as did the statute at issue in District of Columbia v. Greater Washington Board of Trade, 506 U.S. _______, 121 L.Ed.2d 513, 113 S.Ct. 580 (1992). Pet. App. 29a-30a. The Court of Appeals noted benefit plans were but an example of the different kinds of benefits that could be considered in determining prevailing wage rates. Pet. App. 29a-30a.

The Court of Appeals also considered whether the Act and regulations had a sufficient indirect relation to ERISA plans to require pre-emption. Relying on Shaw v. Delta Airlines, 463 U.S. 85 (1983), the Court concluded that merely providing employers the option to satisfy part of their obligation to pay prevailing wages through benefit contributions did not require pre-emption. Pet. App. 37a-39a. The Court of Appeals noted providing the option does not require employers to provide benefits nor does it favor the provision of certain benefits over others. Pet. App. 33a, 38a-40a.

Finally, the Court concluded that neither the Act nor its regulations dictated or restricted the choice of plans regarding their reporting and administration. App. 41a.

This petition followed.

REASONS FOR DENYING THE WRIT

I. THE PETITION DOES NOT PRESENT AN ISSUE OVER WHICH THE COURTS OF APPEALS ARE IN CONFLICT.

Petitioner argues that certiorari should be granted to resolve a conflict between the decision in this case and the decision of the Second Circuit in General Electric Co. v. New York State Department of Labor, 891 F.2d 25 (2d Cir. 1989). Pet. 13-20. The statutory schemes at issue in these cases were not the same; therefore, the resulting decisions do not present a conflict appropriate for resolution by this Court.

The General Electric case concerned whether the administration of New York's prevailing wage law was pre-empted by ERISA. Under New York's statute, contractors on public projects were required to pay their employees "supplements" or fringe benefits in accordance with prevailing practices in the area where the project was located. General Electric, 891 F.2d at 27. If the fringe benefits offered by the contractor did not correspond with the prevailing supplements, the law required the contractor to bring them into conformity or to pay its employees the equivalent in cash. Id. The contractor was not permitted to substitute one form of supplement for another. Id. That is, the contractor did not receive any credit under the prevailing wage law for providing a benefit different from those found to be prevailing by New York's Commissioner of Labor. Id.

In striking down the New York statute, the Second Circuit noted that under ERISA "'private parties and not the government control the level of benefits.'" Id., quoting, Alessi v.

Raybestos - Manhattan, Inc., 451 U.S. 504, 511 (1981). The Court then pointed out that under New York's prevailing wage law the Commissioner of Labor determined the benefits to be provided. General Electric, 891 F.2d at 28. The Court found the law effectively determined the "type and amount of an employer's contributions to be a plan" and "the nature and amount of benefits" provided. Id. at 29.

In contrast, in this case the Court of Appeals specifically noted that Pennsylvania's Act does not require contractors to provide particular benefits at specified levels. App. 39a. Indeed, the Court made it clear that had Pennsylvania's law either required the payment of certain benefits over others or created a cash incentive to provide certain benefits, it would not survive scrutiny under ERISA. App. 39a, 40a. The

Court pointed to the General Electric case as an illustration of the sort of statutory scheme it believed would not pass muster. App. 40a, n.22. Thus, the decision in this case is consistent rather than in conflict with the Second Circuit's decision in General Electric.

The petition also mentions New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Insurance Co., 14 F.3d 708 (2d Cir.), cert. granted, 63 U.S.L.W. 3291 (1994) and hints that the case which is pending before this Court shares a common issue with this matter. Pet. 7. Petitioner is wrong.

The New York case concerns a hospital rate setting statute that imposes rate differentials which may increase the cost of providing hospital benefits for some ERISA plans. This Court granted certiorari to determine whether a statute that affects the cost to ERISA plans of providing benefits, "relates to" those plans and thus requires pre-emption of the statute. As the Third Circuit noted, the Prevailing Wage Act does not affect ERISA plan costs, it affects employers' wage costs. App. 36a-37a, n.18. Thus, the issue pending in the New York case bears no resemblance to the issue presented by this matter.

Finally petitioner also suggests that this Court should grant certiorari because the Third Circuit's decision conflicts with the reasoning of two district courts -- one in California and one in Michigan. Pet. 18. Assuming for purposes of argument that these conflicts exist, granting certiorari on this basis would be premature. It would remove the opportunity for the Courts of Appeals to address the issues and perhaps eliminate the conflicts which appear to exist. Even if the asserted conflicts are not eliminated, the Courts of Appeals should have the opportunity to focus and develop the issues in a way that will assist this Court's review of them in the future. At this juncture, the issues have not sufficiently evolved in the lower courts to merit this Court's attention.

II. THE ISSUE PRESENTED BY THE PETITION WILL HAVE NO IMPACT ON THE LAW OF ERISA PRE-EMPTION BEYOND THE FACTS OF THIS CASE.

Petitioner proposes that this Court decide whether Pennsylvania's Prevailing Wage Act is related to employee benefit plans within the meaning of §514(a) of ERISA. While the resolution of this issue is important to Pennsylvania, there is no reason to believe that it will have any application beyond Pennsylvania.

As the preceding argument illustrated, whether the prevailing wage statutes of the various states survive ERISA pre-emption will often turn on the facts. The manner in which the law is administered certainly varies from state to state. Compare, General Electric, supra, and App. 27a-45a. These differences in administration may well call for different conclusions on preemption which explains the different results in General Electric and this case. See also, National Elevator Industry, Inc. v. Calhoon, 957 F.2d 1555 (10th Cir. 1992) (administration of Prevailing Wage Law that favored participation in one type of ERISA plan, over another is pre-empted).

Cast as it is, the petition does not seek resolution of a legal issue of general importance. Rather, it invites this Court to review the decision of the Court of Appeals for error. As such it does not provide an appropriate basis for the exercise of this Court's discretionary jurisdiction.

III. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT.

The Court of Appeals held that Pennsylvania could establish minimum wages to be paid on public projects and afford employers the option of satisfying a portion of the wage through contributions for employee benefits without intruding into the area pre-empted by ERISA. App. 11a. The Court then concluded that because the Prevailing Wage Act and its regulations could be implemented in such a fashion, they survived Petitioner's challenge. Pet. App. 27a.

This Court has repeatedly cautioned that where ERISA pre-emption is at issue the inquiry "must be guided by respect for the separate spheres of governmental authority preserved in our federalist system." Massachusetts v. Morash, 490 U.S. 107, 119 (1989), quoting, Fort

Halifax Packing Co. v. Coyne, 482 U.S. 1, 19 (1987). In both Morash and Fort Halifax, the Court recognized the states' traditional authority to regulate wages and upheld statutes exercising that authority against challenges based on ERISA pre-emption. Massachusetts v. Morash, supra (upholding Massachusetts' regulation of an employer's vacation pay policy); Fort Halifax Packing Co., supra (upholding a Maine statute requiring employers to provide severance pay). In line with those principles the Court of Appeals in this case concluded that the Prevailing Wage Act authorized the Secretary to establish a minimum prevailing wage without infringing on the area reserved for federal regulation by ERISA.

The Court of Appeals also properly concluded that Pennsylvania could afford employers the option to pay the wages in cash or to satisfy a portion of the obligation through contributions to benefits of their own choosing, regardless of whether the benefits were offered through plans covered by ERISA. In Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983), this Court recognized that while a state may not require employers to design their ERISA plans to conform to state law, it may permit them to choose between complying through a mechanism not covered by ERISA and complying through their ERISA plans.

Shaw concerned the validity of New York's disability benefits law that required employers to provide certain disability benefits. The Court concluded that the law fell within an exception to ERISA's pre-emption clause for benefit plans maintained solely to comply with a state's disability law.[5] Id. at 106. The Court was then confronted with the argument that the law was nonetheless unenforceable with regard to employers who choose to provide disability benefits through multi-benefit ERISA plans. Id. While the Court agreed that the state could not require employers to modify their ERISA plans, it went on to hold that the state "may force the employer to choose between providing disability benefits in a separately administered plan and including state mandated benefits in its ERISA plan." Id. at 107-08. That is exactly what the Court of Appeals determined the Prevailing Wage Act could do. It could require employers to choose between paying the entire wage in cash or satisfying part of it through contributions to fringe benefits.

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[5] 29 U.S.C. §1003(b)(3) exempts from pre-emption:

> any employee benefit plan . . . maintained solely for the purpose of complying with applicable . . . disability insurance laws.

Finally, the Court of Appeals' decision is also consistent with _District of Columbia v. Greater Washington Board of Trade_, 506 U.S. _____, 121 L.Ed.2d 513, 113 S.Ct. 580 (1992). That case involved a statute that required employers who provided health insurance for their employees to provide equivalent coverage for injured employees who were eligible for worker's compensation benefits. The Court held the law pre-empted by ERISA because its obligations were premised on the existence of ERISA-covered plans. _Id_. at _____, 121 L.Ed.2d at 520-21, 113 S.Ct. at 583-84. Absent such plans, the statute could not be applied.

The Court of Appeals correctly recognized that such is not the situation presented by the Prevailing Wage Act:

> In the absence of ERISA plans the Prevailing Wage Act could be meaningfully applied. The Act requires the Secretary to measure prevailing benefit contributions in a locality for a given class of worker. The Secretary would do so even if all of these were non-ERISA benefits -- that is benefits "payable on a regular basis from the general assets of the employer" . . . and that "create no need for an ongoing administrative program for processing claims and paying benefits."

Pet. App. 31a (citations omitted).

The Court also noted the act could be meaningfully applied if a contractor satisfied the benefits component of the wage by contributing to non-ERISA benefits or by paying its monetary equivalent. Id.

Thus, the decision of the Court of Appeals is consistent with prior decisions of this Court concerning ERISA preemption.

CONCLUSION

For these reasons, the respondent asks the Court to deny the writ of certiorari.

Respectfully submitted,

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